11-19-2009

Thomas v. Thomas Clerk's Record v. 1 Dckt. 36857

Supreme Court No. 36857-2009
Volume No. 1 of 6

IN THE
SUPREME COURT
OF THE
STATE OF IDAHO

R. DREW THOMAS,
Plaintiff/Respondent

vs

RONALD O. THOMAS, ELAINE K. THOMAS
And THOMAS MOTORS, INC., an Idaho Corporation
Defendant/Appellants.

Appealed from the District Court of the Third Judicial District of the State of Idaho, in and for the County of Gem,

Honorable Juneal C. Kerrick, District Judge

William A. Morrow
Attorney for the Appellant

John J. Janis
H. Ronald Bjorkman
Attorney for Respondent

Filed this _____ day of _____, 2009

, Clerk
Deputy

IN THE SUPREME COURT OF THE STATE OF IDAHO

R. DREW THOMAS, Plaintiff/Appellant, vs. RONALD O. THOMAS, ELAINE K. THOMAS, And THOMAS MOTORS, INC., and Idaho Corporation, Defendant/Respondent.,	)	SUPREME COURT NO. 36857-2009

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the Third Judicial District of the State of Idaho, in and for the County of Gem.

HONORABLE JUNEAL C. KERRICK
District Judge

Attorney for Appellant
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MORROW & FISCHER, PLLC
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Nampa, ID 83687

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GEM

R. DREW THOMAS, Plaintiff, vs. RONALD O. THOMAS, ELAINE K. THOMAS and THOMAS MOTORS, INC., an Idaho Corporation, Defendants.	**CASE NO.** CV 2006-492 **VERIFIED COMPLAINT AND DEMAND FOR JURY TRIAL** Fee Category: A(1) Fee: $82.00 Assigned Judge Juneal C. Kerr

COMES NOW, Plaintiff R. Drew Thomas, by and through his attorneys of record, the law firm of White Peterson, P.A., and for cause of action against the above-named Defendants hereby complains and alleges as follows:

PARTIES

1. At all relevant times herein mentioned the Plaintiff, R. Drew Thomas (hereinafter "Plaintiff"), is and was a resident of the State of Idaho, residing in Emmett, Gem County, Idaho.

2. At all relevant times herein mentioned the Defendants, Ronald O. Thomas and Elaine K. Thomas, are and were residents of the State of Idaho, residing in Emmett, Gem County, Idaho.

3. At all relevant times herein mentioned the Defendant, Thomas Motors, Inc. has been a corporation duly organized under the laws of the State of Idaho, with its principal place of business in Emmett, Idaho.

JURISDICTION AND VENUE

4. All of the acts complained of herein occurred in Gem County, Idaho making jurisdiction proper in this court.

5. Venue is appropriate pursuant to Idaho Code § 5-404.

GENERAL ALLEGATIONS

6. In 1997, Plaintiff worked at Lanny Berg Chevrolet in Caldwell, Idaho as the manager of the New and Used Car Department.

7. In late 1996, Plaintiff was contacted by Defendant Ronald Thomas, his father, about a business proposal revolving around Defendants Ronald and Elaine Thomas' desire to purchase a new car dealership in Emmett, Idaho.

8. Defendant Ronald O. Thomas was inexperienced in operating a new car operation and sought the advice and assistance of Plaintiff, proposing that if Plaintiff would leave Lanny Berg Chevrolet and manage and operate the new dealership, at a greatly reduced salary, he would give the proposed dealership to Plaintiff when he turned age 62 or 63.

9. Defendant Ronald Thomas pledged to Plaintiff that he would transfer the business by age 63 if Plaintiff left his job and managed the new car business.

10. In late 1997, Defendants Ronald and Elaine Thomas purchased Johannesen Motors in Emmett, Idaho and renamed it Thomas Motors, Inc.

11. Plaintiff accepted Defendant Ronald Thomas' offer but repeatedly requested that their understanding be put in writing; however, Ron Thomas repeatedly informed Plaintiff he did not wish to do so. After numerous requests by Plaintiff, however, Ron Thomas reluctantly agreed to have an attorney prepare written documents. Plaintiff reviewed said documents and signed said documents, but was shortly thereafter advised by Ron Thomas that he (Ron Thomas) was not going to sign them, explaining: "Why would I sell you something that I was just going to give you?" Plaintiff then believed that the written agreement had not been agreed to nor was he ever provided any evidence or documentation to the contrary.

12. In reliance upon his oral agreement with Defendant Ronald Thomas, Plaintiff quit his job at Lanny Berg Chevrolet and went to work at Thomas Motors; in so doing, Plaintiff took a significant reduction in pay under the understanding that pursuant to his agreement with Defendants he would receive the ownership of Thomas Motors when his father turned age 63.

13. Even though Plaintiff managed the daily operations of the dealership, Defendants Ronald and Elaine Thomas controlled the money and assets of the dealership and, on information and belief, the Defendants consistently used assets and funds of Thomas Motors for their personal use.

14. In early 2000, Defendants told Plaintiff that they were making double payments in order to pay down Thomas Motors' debts; however, because of a failure on the part of Defendants to keep up-to-date on the flooring line of credit, Wells Fargo referred the Thomas

Motors account to special assets (troubled accounts). On information and belief, Defendants had shifted portions of the Thomas Motors flooring line of credit for a used car lot that they operated called, Lot of Cars.

15. After being referred to Special Assets, Plaintiff personally worked with Wells Fargo an extraordinary amount of hours at great personal sacrifice in order to maintain a flooring line of credit at Thomas Motors and assure that Thomas Motors remained an open and viable entity.

16. In 2002, after bringing the loan with Wells Fargo up-to-date, Thomas Motors arranged with Key Bank for a new flooring line for used cars, a new flooring line for new cars and a new note on the real property upon which Thomas Motors was situated.

17. During this period, out of frustrations due to the financial manipulations by the Defendants, Plaintiff had repeated discussions with the Defendants about leaving Thomas Motors; however, Defendants pledged to change how the finances of Thomas Motors were maintained and reassured Plaintiff that everything with Thomas Motors was being done for his benefit and that it would be his after Defendant Ronald Thomas turned age 63.

18. On information and belief, in October 2005, Defendants Ronald and Elaine Thomas began marketing Thomas Motors in an effort to find a buyer; however, the Defendants repeatedly denied this fact to Plaintiff as well as other family members and employees of Thomas Motors.

19. In January 2006, Defendants entered into an agreement in principle to sell Thomas Motors at a substantial profit to a third party, Salmon River Motors in Salmon, Idaho.

20. At no point prior to the sale did Defendants discuss this matter with Plaintiff.

21. On or about, March 15, 2006, the sale of Thomas Motors to the aforementioned third party was finalized.

COUNT ONE
Breach of Contract

22. Plaintiff hereby realleges the allegations contained in Paragraphs 1 through 21 of this Complaint as if set forth in full herein.

23. Prior to the purchase of Johannesen Motors in late 1997, Defendant Ronald Thomas proposed to Plaintiff that if Plaintiff would leave his job at Lanny Berg Chevrolet and agree to manage and operate what would become Thomas Motors, Inc. at a greatly reduced salary, Defendant would give him Thomas Motors when Defendant turned age 63.

24. Plaintiff accepted the Defendant's offer, and in reliance on the offer, took over the day-to-day operation and management of Thomas Motors, Inc.

25. Plaintiff fully and adequately performed every requirement placed on him by the aforementioned agreement except where performance was prevented by actions and/or conduct of the Defendants.

26. Defendants, however, have failed to perform and/or continuously frustrated the purpose of the agreement by, *inter alia*, diverting funds from Thomas Motors and/or creditor's of Thomas Motors Inc. to his and Elaine Thomas' personal use, diverting funds from Thomas Motors and/or creditor's of Thomas Motors Inc. to unrelated entities, and unilaterally selling Thomas Motors, Inc. to a third-party and, consequently, breaching the agreement with Plaintiff.

27. As a result of this breach, the Plaintiff has been damaged in an amount to be proven with specificity at trial, but is in excess of $500,000.

28. Plaintiff hereby reserves this paragraph for a claim of punitive damages pursuant to Idaho Code § 6-1604.

COUNT TWO
Breach of the Implied Covenant of Good Faith and Fair Dealing

29. Plaintiff hereby realleges the allegations contained in Paragraphs 1 through 28 of this Complaint as if set forth in full herein.

30. The Defendants breach of the aforementioned agreement with Plaintiff was motivated by bad faith and malice and breached the covenant of good faith and fair dealing implied in the parties' contract.

31. Defendant's conduct was willful and intentional.

32. As a direct result of Defendant's breach of the implied covenant of good faith and fair dealing, Plaintiff has suffered damages in an amount exceeding $10,000 to be proven with specificity at trial.

33. Plaintiffs reserve this Paragraph for the inclusion of a claim for punitive damages pursuant to Idaho Code § 6-1604.

COUNT THREE
Quasi-Contract

34. Plaintiff hereby realleges the allegations contained in Paragraphs 1 through 33 of this Complaint as if set forth in full herein.

35. Prior to the purchase of Johannesen Motors in late 1997, Defendant Ronald Thomas proposed to Plaintiff that if Plaintiff would leave his job at Lanny Berg Chevrolet and agree to manage and operate what would become Thomas Motors, Inc. at a drastically reduced salary, Defendant would give him Thomas Motors when Defendant turned age 63.

36. Plaintiff accepted the Defendant's offer, and in reliance on the offer, took over the day-to-day operation and management of Thomas Motors, Inc.

37. To the best of his ability, Plaintiff fully and adequately performed every requirement placed on him by the aforementioned agreement and in doing so conferred a direct benefit to the Defendants.

38. Defendants were aware of and appreciated the benefit conferred upon it by Plaintiff.

39. It is inequitable for Defendants to retain the benefit conferred on them by Plaintiff without being required to repay Plaintiff for the value of that benefit.

40. Because of Defendant's failure to compensate Plaintiff for the actual value of the benefit he conferred upon them, the Defendant has been unjustly enriched in an amount in excess of $100,000 to be proven with specificity at trial.

41. Plaintiff reserves this Paragraph for the inclusion of a claim for punitive damages pursuant to Idaho Code § 6-1604.

COUNT FOUR
Breach of Contract
(In the Alternative)[1]

42. Plaintiff hereby realleges the allegations contained in Paragraphs 1 through 33 of this Complaint as if set forth in full herein.

43. After Plaintiff accepted Defendant Ronald Thomas' offer to leave Lanny Berg Chevrolet and come manage Thomas Motors, the Plaintiff repeatedly requested that their understanding be put in writing; however, Ron Thomas repeatedly informed Plaintiff he did not

[1] While it is the Plaintiff's position that no written contract was ever validly executed between the parties, the Plaintiff offers this Cause of Action in the event that it is later determined that a contract had been formed between the Plaintiff and Defendants. By pleading this Cause of Action, however, the Plaintiff is in no way asserting that it is his belief that a validly executed contract was agreed to by the parties.

wish to do so. After numerous requests by Plaintiff, however, Ron Thomas reluctantly agreed to have an attorney prepare written documents. Plaintiff reviewed said documents and signed said documents which were then delivered to Defendant Ronald Thomas.

44. Plaintiff fully and adequately performed every requirement placed on him by the aforementioned agreement except where the actions and/or conduct of the Defendants prevented his performance.

45. Defendants, however, have failed to abide by the terms of said agreement and, as such, have materially breached it.

46. As a result of this breach, the Plaintiff has been damaged in an amount to be proven with specificity at trial, but is in excess of $500,000.

47. Plaintiff hereby reserves this paragraph for a claim of punitive damages pursuant to Idaho Code § 6-1604.

COUNT FIVE
Fraud

48. Plaintiff hereby realleges the allegations contained in Paragraphs 1 through 47 of this Complaint as if set forth in full herein.

49. Prior to the purchase of Johannesen Motors in late 1997, Defendant Ronald O. Thomas proposed to Plaintiff that if Plaintiff would leave his job at Lanny Berg Chevrolet and agree to manage and operate what would become Thomas Motors, Inc. at a drastically reduced salary, Defendant would give him Thomas Motors when Defendant turned age 63.

50. Defendant Ronald Thomas made this offer in an attempt to induce Plaintiff into leaving his job and begin working for the Defendants. This offer was made in an effort to procure the Plaintiff's extensive knowledge and background related to the day-to-day operation and management of a large scale new car dealership.

51. On information and belief, when Defendant made these statements he knew that he had no intention of fully performing his obligations under the contract.

52. When Defendant Ronald O. Thomas made the above-referenced offer he knew or reasonably should have known that Plaintiff would rely on his assertions and promises.

53. In reliance on the Defendants promises and offer, Plaintiff quit his job and began working for the Defendant at a drastically below market salary with the understanding that when Defendant Ronald Thomas turned age 63 he would take over the ownership of Thomas Motors, Inc. and Plaintiff continued to perform in reliance of Defendants' promises for over eight and one-half years.

54. As a direct and proximate result of the Defendant's fraudulent assertions, the Plaintiff has been harmed in an amount to be proven with specificity at trial, but is in excess of $100,000.

55. Plaintiff reserves this Paragraph for the inclusion of a claim for punitive damages pursuant to Idaho Code § 6-1604.

RESERVATION OF CLAIMS

56. Plaintiff hereby reserves the right to include further claims that may be developed during the course of discovery in this matter.

ATTORNEY FEES

As a result of the Defendants' actions as set forth above, the Plaintiff has been required to retain the law firm of White Peterson, P.A., to prosecute this action and has incurred and will continue to incur costs and attorney fees for which he is entitled to a separate award, pursuant to Idaho Code §§ 12-120 and 12-121, as well as any other applicable statute or rule, in an amount to be determined by the Court.

DEMAND FOR JURY TRIAL

Plaintiff demands a trial by jury comprised of not less than twelve (12) persons on all issues so triable, pursuant to Idaho Rule of Civil Procedure 38(b).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for Judgment, Decree, and Order from this Court as follows:

1. For money damages from Defendants that fully and fairly compensates Plaintiff for Defendant's breach of contract, breach of implied covenant of good faith and fair dealing, and/or unjust enrichment in a sum to be determined at trial but exceeding $10,000;

2. For money damages from Defendants that fully and fairly compensates Plaintiff for Defendants' fraud and/or misrepresentation in a sum to be determined at trial but exceeding $10,000;

3. For costs and attorney fees under Idaho Code §§ 12-120, 12-121, and other applicable state laws; and

4. For such other and further relief as the court deems just and equitable.

DATED this 21 day of June, 2006.

WHITE PETERSON, P.A.

By: _____
William A. Morrow
Attorneys for Plaintiff

VERIFICATION

STATE OF IDAHO)
) ss.
County of Canyon)

R. DREW THOMAS, being first duly sworn, depose and say that he is the Plaintiff in the above-entitled matter, has read the foregoing COMPLAINT AND DEMAND FOR JURY TRIAL and verifies that the matters therein stated are true and correct, and as to those matters stated and information and belief, believes them to be true.

DATED this 21 day of June, 2006.

R. Drew Thomas

SUBSCRIBED AND SWORN to before me this 21 day of June, 2006.

SHEILA R. WEBB NOTARY PUBLIC STATE OF IDAHO

Notary Public for Idaho
My Commission Expires: 7-17-06

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Attorneys for Defendants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GEM

* * * * *

R. DREW THOMAS, Plaintiff, vs. RONALD O. THOMAS, ELAINE K. THOMAS and THOMAS MOTORS, INC., an Idaho Corporation, Defendants.	)	Case No. CV 2006-492 **DEFENDANTS' ANSWER AND DEMAND FOR JURY TRIAL**

* * * * *

COMES NOW, the Defendants Ronald O. Thomas, Elaine K. Thomas and

ORIGINAL 000034

Thomas Motors, Inc., by and through their attorneys of record, the law firm of Hepworth, Lezamiz & Janis, and H. Ronald Bjorkman, and in answer to the Plaintiff's Complaint, hereby states and alleges as follows:

FIRST DEFENSE

The Plaintiff's Complaint fails to state a cause of action upon which relief could be granted.

SECOND DEFENSE

Defendants deny each and every allegation of the Plaintiff's Complaint not expressly and specifically admitted herein.

Responding to the specific allegations in Plaintiff's Verified Complaint and Demand for Jury Trial, the Defendants respond, state, and allege as follows:

1. The Defendants admit the allegations contained in paragraphs 1 through 3, inclusive.

2. Responding to paragraphs 4 and 5 of Plaintiff's Complaint, the Defendants agree this Court has jurisdiction, and venue of this case is appropriate in Gem County.

3. The general allegations stated in paragraph 6 through 9, inclusive, of Plaintiff's Complaint are denied.

4. The Defendants admit the allegations contained in paragraph 10 of Plaintiff's Complaint.

5. The allegations contained in paragraphs 11 through 21, inclusive, are denied.

6. Responding to the allegations contained in Count One of Plaintiff's Complaint, the allegations contained in paragraphs 22 through 28, are denied.

7. Responding to the allegations contained in Count Two of Plaintiff's Complaint, the allegations contained in paragraphs 29 through 33, inclusive, are denied.

8. Responding to the allegations contained in Count Three of Plaintiff's Complaint, the allegations contained in paragraphs 34 through 41, inclusive, are denied.

9. Responding to the allegations contained in Count Four of the Plaintiff's Complaint, the allegations contained in paragraphs 42 through 47 are denied, other than the Plaintiff's admission that he reviewed the written agreements with the Defendants, and that the Plaintiff signed said documents.

10. Responding to the allegations contained in Count Five of the Plaintiff's Complaint, the allegations contained in paragraphs 48 through 55, inclusive, are denied.

11. Responding to the "reservation of claims" stated in paragraph 56 of the Plaintiff's Complaint, the Defendants specifically object, and deny that the Plaintiff can properly reserve the right to include further claims in the Complaint document in this manner. Plaintiff is obligated to state any and all causes of action in the original Complaint, and to the extent the Plaintiff seeks to add any further causes of action, such must be accomplished by a motion practice consistent with the Idaho Rules of Civil Procedure.

FIRST AFFIRMATIVE DEFENSE

The Plaintiff's claims are barred by the statute of frauds provisions under Idaho Code § 9-505.

SECOND AFFIRMATIVE DEFENSE

The Plaintiff's causes of action are barred by the applicable statute of limitations under Idaho law, including Idaho Code § 5-217, 5-216 and/or 5-218.

THIRD AFFIRMATIVE DEFENSE

The Plaintiff's claims in this action are barred by the doctrines of waiver.

FOURTH AFFIRMATIVE DEFENSE

The Plaintiff's claims in this case are barred by the doctrine of estoppel.

FIFTH AFFIRMATIVE DEFENSE

The Plaintiff's claims in this case are barred by the doctrine of laches.

SIXTH AFFIRMATIVE DEFENSE

The parties entered into written contractual agreement which superseded any prior oral agreements, promise and/or representation.

SEVENTH AFFIRMATIVE DEFENSE

The Plaintiff's did enter into written contractual agreements with the defendants, but the Plaintiff breached material provisions of said contracts, and thereby forfeited all contractual rights attendant thereto.

EIGHTH AFFIRMATIVE DEFENSE

To the extent the Plaintiff seeks equitable relief, such of Plaintiff's claims are barred by the doctrine of unclean hands.

NINTH AFFIRMATIVE DEFENSE

The Plaintiff's claims are barred due to an impossibility of performance.

TENTH AFFIRMATIVE DEFENSE

The Plaintiff's claims are barred by the doctrine of release and/or accord and satisfaction.

REQUEST FOR ATTORNEYS FEES

The Plaintiff's claims are without entirely merit in this action, and the Defendants are entitled to recover all reasonable attorneys fees and costs incurred in defense of this action pursuant to Idaho law, specifically including, Idaho Code § 12-120, 12-121 and 12-123. The Defendants are also entitled to recover such attorneys fees pursuant to the written contractual agreements between the parties in this action.

DEMAND FOR JURY TRIAL

The Defendants hereby demand a trial by jury of 12 persons, in accordance with Rule 38(b) of the Idaho Rules of Civil Procedure.

PRAYER FOR RELIEF

WHEREFORE, the Defendants and each of them respectfully pray for judgment in this matter as follows:

1. That the Plaintiff's Complaint be dismissed with prejudice, and the Plaintiff take nothing thereby;
2. That the Defendants recover judgment against the Plaintiff for all costs and attorneys fees incurred in defense of this action pursuant to Idaho law and/or the contractual Agreements between the parties; and,
3. For such other and further relief as the Court deems just and equitable.

DATED this 29th day of June, 2006.

HEPWORTH, LEZAMIZ & JANIS

By _____
John J. Janis
Attorneys for Defendants

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, with offices at 537 W. Bannock Street, Suite 200, P.O. Box 2582, Boise, Idaho 83701, and one of the attorneys for the Defendants in this matter, certifies that on this 29th day of JUNE, 2006, he caused to be served a true and correct copy of the above and foregoing by the method indicated below, and addressed to the following:

William A. Morrow	[X] U.S. Mail
WHITE, PETERSON, PA	[ ] Hand Delivered
5700 E. Franklin Rd., Ste. 200	[ ] Overnight Mail
Nampa, Idaho 83687-7901	[X] Telecopy (Fax)

John J. Janis

William A. Morrow
James M. Vavrek
WHITE PETERSON, P.A.
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Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GEM

R. DREW THOMAS, Plaintiff, vs. RONALD O. THOMAS, ELAINE K. THOMAS and THOMAS MOTORS, INC., an Idaho Corporation, Defendants.	**CASE NO. CV 2006-492** **AFFIDAVIT OF JAMES M. VAVREK IN SUPPORT OF MOTION TO COMPEL**

JAMES M. VAVREK, having first duly sworn upon oath, deposes and says:

1. I am one of the attorneys of record for the Plaintiff in the above-entitled matter and have personal knowledge of all facts contained herein.

2. That attached hereto as Exhibit "A" and incorporated herein by this reference is a true and correct copy of *PLAINTIFF'S FIRST INTERROGATORIES AND PLAINTIFF'S FIRST*

SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS, which was served upon Defendants, on July 7, 2006.

3. That attached hereto as Exhibit "B" and incorporated herein by this reference is a true and correct copy of DEFENDANTS RESPONSES TO PLAINTIFF'S FIRST SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS.

4. That attached hereto as Exhibit "C" and incorporated by this reference is a true and correct copy of a letter sent by Plaintiff's counsel to Defendant's Counsel to confer about, *inter alia*, access for inspection and testing of documents at issue in this motion.

5. That attached hereto as Exhibit "D" and incorporated by this reference is a true and correct copy of the letter sent by Defendant's counsel to Plaintiff's counsel in response to the above-referenced letter.

6. That attached hereto as Exhibit "E" and incorporated by this reference is a true and correct copy of a letter sent by Plaintiff's counsel to Defendant's counsel again attempting to confer about access for inspection and testing of the documents at issue in this motion.

7. That attached hereto as Exhibit "F" and incorporated by this reference is a true and correct copy of a letter sent by Defendant's counsel to Plaintiff's counsel again denying Plaintiff access to the documents at issue in this motion.

8. That Plaintiff has substantial need for the documents requested; as they are to be used in the preparation of its case and the Plaintiff is unable, without undue hardship, to obtain the substantial equivalent of the material contained therein by any other means.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

DATED this 19 day of September, 2006.

James M. Vavrek

SUBSCRIBED AND SWORN to before me this 19th day of September, 2006.

(SEAL)

SHEILA R. WEBB NOTARY PUBLIC STATE OF IDAHO

Notary Public for Idaho
My commission expires: 7-17-12

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of September, 2006, I caused to be served a true and correct copy of the foregoing document by the method indicated below to the following:

John J. Janis HEPWORTH, LEZAMIZ & JANIS 537 W. Bannock Street, Ste. 200 P.O. Box 2582 Boise, ID 83701-2582	X _____ _____ _____	US Mail Overnight Mail Hand Delivery Facsimile No. 208-342-2927
H. Ronald Bjorkman Attorney at Law 109 N. Hays P.O. Box 188 Emmett, ID 83617-0188	X _____ _____ _____	US Mail Overnight Mail Hand Delivery Facsimile No. 208-365-4196

WHITE PETERSON, P.A.

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EXHIBIT "A"

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Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GEM

R. DREW THOMAS, Plaintiff, vs. RONALD O. THOMAS, ELAINE K. THOMAS and THOMAS MOTORS, INC., an Idaho Corporation, Defendants.	**CASE NO. CV 2006-492** **PLAINTIFF'S FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION PROPOUNDED TO DEFENDANTS**

NOTICE

YOU WILL PLEASE TAKE NOTICE that, in accordance with Rule 33 of the Idaho Rules of Civil Procedure, you are hereby required to answer in writing the following interrogatories and requests within thirty (30) days from the date of service hereof.

INSTRUCTIONS

1. **Procedure**. You have a duty, pursuant to Rule 26(e) of the Federal Rules of Civil Procedure, to reasonably supplement and amend your responses.

2. **Definitions**. As used herein:

2.1 **Document**. The term "document" means all writings of every kind pertaining to the subject matter of this litigation, including, but not limited to, the original or a copy of all records, letters, correspondence, appointment books, diaries, files, notes, statements, memoranda, reports, reports on investigations, telegrams, summaries, memoranda or minutes of meetings, conferences and telephone calls, receipts, written reports or opinions of investigators or experts, status reports, drawings, charts, photographs, negatives, brochures, lists, schedules, manuals, manuals used by investigators, expense accounts, financial statements, tax returns, estimates, inventories, contracts, agreements, drafts, working papers, tapes, data sheets, or data processing matter, including data recorded and/or stored electronically, however produced or reproduced, within your possession or subject to your control, of which you have knowledge or to which you now have or have had access, or of which any of your agents, attorneys, accountants or consultants have knowledge.

2.2 **Identify – Individuals**. The term "identify," when used in reference to an individual person, means to state his or her name, including any aliases or former names, residence address and telephone number, occupation, employer, job title or position, business address, business telephone number, and present and/or last known whereabouts.

2.3 **Identify – Documents**. The term "identify," when used in reference to a "document," means to state the date of preparation of the document, its author, the sender, the recipient (if any), the nature of the document (e.g., letter, memo, tape, etc.) and other means of

identification sufficient to identify the documents for purposes of a request for production, and its present location and custodian. If any such document was, but no longer is, in your possession or custody or subject to your control, state what disposition was made of it and give the name, address and telephone number of the person presently with possession, custody or control of the document.

2.4 **Identify -- Business or Other Entity.** The term "identify," when used in reference to anything other than a human being, including, without limitation, a corporation, partnership, joint venture, association, labor union, or other business, social or legal entity of any kind, means to state:

(a) Full lawful name, and all other names or styles used, at any time, and for any purpose whether or not registered;

(b) Business address and telephone;

(c) Registered office and name and address of registered agent;

(d) State and foreign countries where qualified to do business;

(e) All business addresses and telephones in this State;

(f) State and date of incorporation;

(g) Name and address of chief executive officer;

(h) Name and address of Idaho agent for service of process;

(i) Name, principal office, state and date of incorporation, and name of chief executive officer of:

(1) Any controlling corporation;

(2) Any subsidiary corporation;

(j) Name and address of all persons owning a controlling interest, and a description of the extent of such interest.

2.5 **State the Sources of Your Information**. The term "state the sources of your information" means to "identify" the person and the document from which information was obtained when your answer to any question is not based on information within your actual knowledge.

2.6 **Contact**. The word "contact," in either the present or past tense, means conversations, telephone calls or conferences, conferences, meetings and correspondence.

2.7 **Instance**. The word "instance" means each occasion a "contact" was made, and you are to state the date and circumstances surrounding the "contact," including the names and addresses of all "persons" involved.

2.8 **Communication or Discussion**. "Communication" or "discussion" means a conversation, meeting, message, telephone call, letter, memorandum or any means of transmitting a message. When you respond to a question about a "communication," please state:

(a) The date when it occurred;

(b) The place where it occurred;

(c) All persons party to it;

(d) The manner in which it occurred (such as a letter, telephone call, or conversation);

(e) The subject matter; and

(f) Identify all documents which record the fact that the communication took place.

2.9 **Person**. "Person" means, without limitation, human beings, corporations, partnerships, joint ventures, associations, trusts, labor unions, or any form of business, social or legal entity.

2.10 **You**. "You" means the party to whom these interrogatories are addressed, and your past or present attorneys, agents, employees, officers, representatives, adjusters, investigators, and any other "person" who is in possession, or who has obtained, information on your behalf.

2.11 **Gender, Number**. As used herein, the singular shall include the plural, and any one gender the others, as the context requires.

3. **Privilege**. If, in responding or failing to respond to the discovery requested herein, you invoke or rely upon any privilege of any kind, please state specifically the nature of the privilege and the basis upon which you invoke, rely upon, or claim it, and identify all documents or other information, including contracts and communications, which you believe to be embraced by the privilege invoked.

INTERROGATORIES

INTERROGATORY NO. 1: Documents pertaining to this action. Please separately identify each document which pertains to any issue in this action.

INTERROGATORY NO. 2: Communications between you and each party to this action. Please separately identify each instance of a communication, discussion, or contract between you and your representatives and each party to this action which is relevant to any issue in this action or which you intend to offer in evidence at the trial of this action for any purpose.

INTERROGATORY NO. 3: Witnesses with knowledge of the issues, ect. Please separately identify each person who, according to your information or knowledge, or the information or

knowledge of your representatives, has knowledge of any of the issues or any of the occurrences which are relevant to this action.

INTERROGATORY NO. 4: Experts retained by not expected to testify. Please separately identify each person retained or specially employed by you as an expert in anticipation of this litigation or in preparation for the trial of this action whom you don not expect to call as a witness at the trial of this action.

INTERROGATORY NO. 5: Expert witnesses for trial. Please separately identify each person whom you may call as an expert witness at the trial of this action, and state the subject matter on which such expert witness is expected to testify, the substance of the facts to which such expert witness is expected to testify, and the substance of the opinions to which such expert witness is expected to testify.

INTERROGATORY NO. 6: Persons supplying answers hereto. Please separately identify each person who supplied answers to these interrogatories and designate the answers or answer or part thereof supplied by such person. For any answer or part thereof not within your actual knowledge, state the sources of your information. (This interrogatory is intended to discover principal sources of information and does not seek to ascertain the identity of mere draftsmen or persons responsible for the mechanical preparation of answers.)

INTERROGATORY NO. 7: Has you ever been party to any lawsuit or litigation? If your answer is anything other than an unqualified "No," then for each such case in which you were involved within the preceding fifteen (15) years, please set forth the following information specifically and in detail:

A. The title and nature of the action and a brief description of your role or part in it.

B. The name and address of the court and the case number.

C. The resulting verdict or judgment.

D. The name, address, and telephone number of all attorneys involved in the litigation.

E. The name, address, and telephone number of each person or entity, other than yourself, who was a party to the litigation.

INTERROGATORY NO. 8: Please describe in complete detail all facts which form the basis of your denial of the allegation that: "Defendants, however, have failed to perform and/or continuously frustrated the purpose of the agreement by, inter alia, diverting funds from Thomas Motors and/or creditor's of Thomas Motors Inc to his and Elaine Thomas' personal use, diverting funds from Thomas Motors and/or creditor's of Thomas Motors, Inc. to unrelated entities, and unilaterally selling Thomas Motors, Inc. to a third party and, consequently, breaching the agreement with Plaintiff." By this interrogatory, Plaintiff seeks the facts, persons with knowledge, and any documents which support your denial.

INTERROGATORY NO. 9: Please describe in complete detail all facts which form the basis of your denial of the allegation that: "Defendant Ronald Thomas made this offer in an attempt to induce Plaintiff into leaving his job and begin working for the Defendants. This offer was made in an effort to procure the Plaintiff's extensive knowledge and background related to the day-to-day operation and management of a large scale new car dealership." By this interrogatory, Plaintiff seeks the facts, persons with knowledge, and any documents which support your denial.

INTERROGATORY NO. 10: Please describe in complete detail all facts which form the basis of your denial of the allegation that: "After being referred to Special Assets, Plaintiff

personally worked with Wells Fargo an extraordinary amount of hours at great personal sacrifice in order to maintain a flooring line of credit at Thomas Motors and assure Thomas Motors remained an open and viable entity." By this interrogatory, Plaintiff seeks the facts, persons with knowledge, and any documents which support your denial.

INTERROGATORY NO. 11: Please describe in complete detail all facts which form the basis of your denial of the allegation that: "In 2002, after bringing the loan with Wells Fargo up-to-date, Thomas Motors arranged with Key Bank for a new flooring line for used cars, a new flooring line for new cars and a new note on the real property upon which Thomas Motors was situated." By this interrogatory, Plaintiff seeks the facts, persons with knowledge, and any documents which support your denial.

INTERROGATORY NO. 12: Please describe in complete detail all facts which form the basis of your affirmative defense that: "The Plaintiff's (sic) did enter into written contractual agreements with defendants, but the Plaintiff breached material provisions of said contracts, and thereby forfeited all contractual rights attendant thereto." By this interrogatory, Plaintiff seeks the facts, persons with knowledge, and any documents which tends to support this affirmative defense.

INTERROGATORY NO. 13: Please describe in complete detail all facts which form the basis of your affirmative defense that: "The Plaintiff's claims are barred due to an impossibility of performance." By this interrogatory, Plaintiff seeks the facts, persons with knowledge, and any documents which tend to support this affirmative defense.

INTERROGATORY NO. 14: Please describe in complete detail all facts which form the basis of your affirmative defense that: "The Plaintiff's claims are barred by the doctrine of

release and/or accord and satisfaction." By this interrogatory, Plaintiff seeks the facts, persons with knowledge and any documents which tend to support this affirmative defense.

INTERROGATORY NO. 15: Attached hereto as Exhibit "A" is a copy of a "Commercial Lease and Purchase Agreement," "Agreement for Purchase and Sale of Business Assets" and "Management Contract," which purportedly contains the signatures of Plaintiff and Defendants Ronald and Elaine Thomas. Please describe and explain in full and complete detail each and every effort made by you to comply with the requirements of this alleged Agreement.

REQUEST FOR PRODUCTION OF DOCUMENTS

REQUEST FOR PRODUCTION NO. 1: Please produce any and all documents related to the sale and/or auction of assets/inventory relating to Thomas Motors, Inc., Thomas Motors, Lot of Cars 2, Emmett Auto Parts (NAPA), Parts Plus, Emmett Auto Care, Thomas Auto Parts and any entity owned, operated, and/or controlled by either of the individual defendants in this action.

REQUEST FOR PRODUCTION NO. 2: Please produce copies off the tax returns for calendar years 1995 through 2005 inclusive. This request encompasses both the personal tax returns for the individual defendants as well as the corporate tax returns for any entity owned, operated, and/or controlled by either of the individual defendants during the referenced period.

REQUEST FOR PRODUCTION NO. 3: Please produce and/or make available for inspection/investigation the original document(s) which you claim and allege support your position that a valid written contract was executed between yourselves and Plaintiff.

REQUEST FOR PRODUCTION NO. 4: Please produce copies of any and all exhibits you intend to use at the trial of this action.

REQUEST FOR PRODUCTION NO. 5: Please produce and attach copies of the educational and professional qualifications of all expert witnesses you will call at trial and also attach copies of each and every report generated by each expert witness referred to herein.

REQUEST FOR PRODUCTION NO. 6: Please produce copies of any and all documents identified or relied upon by you in your Answer to Interrogatory Number 1, including, but not limited to, all documents which contain a part or all of each such answer, and all documents which you identified in said answer.

REQUEST FOR PRODUCTION NO. 7: Please produce copies of any and all documents identified or relied upon by you in your Answer to Interrogatory Number 2, including, but not limited to, all documents which contain a part or all of each such answer, and all documents which you identified in said answer.

REQUEST FOR PRODUCTION NO. 8: Please produce copies of any and all documents identified or relied upon by you in your Answer to Interrogatory Number 3, including, but not limited to, all documents which contain a part or all of each such answer, and all documents which you identified in said answer.

REQUEST FOR PRODUCTION NO. 9: Please produce copies of any and all documents identified or relied upon by you in your Answer to Interrogatory Number 4, including, but not limited to, all documents which contain a part or all of each such answer, and all documents which you identified in said answer.

REQUEST FOR PRODUCTION NO. 10: Please produce copies of any and all documents identified or relied upon by you in your Answer to Interrogatory Number 5, including, but not limited to, all documents which contain a part or all of each such answer, and all documents which you identified in said answer.

REQUEST FOR PRODUCTION NO. 11: Please produce copies of any and all documents identified or relied upon by you in your Answer to Interrogatory Number 6, including, but not limited to, all documents which contain a part or all of each such answer, and all documents which you identified in said answer.

REQUEST FOR PRODUCTION NO. 12: Please produce copies of any and all documents identified or relied upon by you in your Answer to Interrogatory Number 7, including, but not limited to, all documents which contain a part or all of each such answer, and all documents which you identified in said answer.

REQUEST FOR PRODUCTION NO. 13: Please produce copies of any and all documents identified or relied upon by you in your Answer to Interrogatory Number 8, including, but not limited to, all documents which contain a part or all of each such answer, and all documents which you identified in said answer.

REQUEST FOR PRODUCTION NO. 14: Please produce copies of any and all documents identified or relied upon by you in your Answer to Interrogatory Number 9, including, but not limited to, all documents which contain a part or all of each such answer, and all documents which you identified in said answer.

REQUEST FOR PRODUCTION NO. 15: Please produce copies of any and all documents identified or relied upon by you in your Answer to Interrogatory Number 10, including, but not limited to, all documents which contain a part or all of each such answer, and all documents which you identified in said answer.

REQUEST FOR PRODUCTION NO. 16: Please produce copies of any and all documents identified or relied upon by you in your Answer to Interrogatory Number 11,

including, but not limited to, all documents which contain a part or all of each such answer, and all documents which you identified in said answer.

REQUEST FOR PRODUCTION NO. 17: Please produce copies of any and all documents identified or relied upon by you in your Answer to Interrogatory Number 12, including, but not limited to, all documents which contain a part or all of each such answer, and all documents which you identified in said answer.

REQUEST FOR PRODUCTION NO. 18: Please produce copies of any and all documents identified or relied upon by you in your Answer to Interrogatory Number 13, including, but not limited to, all documents which contain a part or all of each such answer, and all documents which you identified in said answer.

REQUEST FOR PRODUCTION NO. 19: Please produce copies of any and all documents identified or relied upon by you in your Answer to Interrogatory Number 14, including, but not limited to, all documents which contain a part or all of each such answer, and all documents which you identified in said answer.

REQUEST FOR PRODUCTION NO. 20: Please produce copies of any and all documents identified or relied upon by you in your Answer to Interrogatory Number 15, including, but not limited to, all documents which contain a part or all of each such answer, and all documents which you identified in said answer.

REQUEST FOR PRODUCTION NO. 21: Please produce any and all documents which document and/or demonstrate the transfer and/or sale of any item of inventory or asset between Thomas Motors, Inc., Thomas Motors, Lot of Cars 2, Emmett Auto Parts (NAPA), Parts Plus, Emmett Auto Care, Thomas Auto Parts and any entity owned, operated, and/or controlled by either of the individual defendants in this action.

DATED this 7th day of July, 2006.

WHITE PETERSON, P.A.

By: _____
James M. Vavrek
Attorneys for Plaintiff

EXHIBIT "A"

COMMERCIAL LEASE AND PURCHASE AGREEMENT

THIS COMMERCIAL LEASE AND PURCHASE AGREEMENT ("**Lease**"), dated this 1st day of September 2000, is entered into by and between RONALD O. THOMAS and ELAINE K. THOMAS, husband and wife, of the County of Gem, State of Idaho (collectively referred to herein as "**Landlord**"), THOMAS MOTORS, INC., an Idaho corporation ("**Tenant**"), and R. DREW THOMAS, a single person, of the County of Gem, State of Idaho ("**General Manager**").

Section 1. Real Property and Improvements.

1.1 **Lease of Property.** Landlord hereby leases to Tenant, and Tenant hereby leases from Landlord, those two (2) certain parcels of real property located in Gem County, Idaho, and more particularly described as Parcel 1 and Parcel 2 on Exhibit A attached to this Lease and incorporated by this reference as if set forth in full (collectively the "**Leased Property**"), Parcel 1 of which Leased Property contains an automotive sales and service facility (the "**Premises**"), and Parcel 2 of which Leased Property contains an automotive sales lot. The Leased Property and the Premises are sometimes collectively referred to as the "**Property**" in this Lease.

1.2 **Substitution of Parcel 3.** Parcel 3 of real property located in Gem County, Idaho and more particularly described on Exhibit A, which adjoins Parcel 1, shall be substituted for Parcel 2 under the terms of Section 1.1 at any time prior to September 1, 2005, which date of substitution shall be made by Tenant's assignee by giving Landlord at least ninety (90) days advance written notice. In the event such notice has not been given at least ninety (90) days in advance of September 1, 2003, the parties shall review the space and property utilization plans of the dealership and mutually determine exactly when the substitution shall occur. In recognition of the fact that Parcel 3 is undeveloped real property, Tenant's assignee shall have the right to begin construction of improvements to prepare Parcel 3 to be an automotive sales lot as soon as such notice has been given, subject to the provisions of Section 5. From and after the date of such notice, the Leased Property shall include all three (3) parcels until the time of the effective date of that notice, and thereafter the Leased Property shall include only Parcels 1 and 3.

1.3 **Purchase of Assets.** The parties acknowledge that, concurrently herewith, Tenant and General Manager are entering into that certain Management Contract (the "**Contract**"), by which the General Manager first shall operate Tenant's automotive sales and service business (the "**Business**") for a period of up to one (1) year from and after September 1, 2000. The parties further acknowledge that, concurrently herewith, the parties are entering into that certain Agreement for Purchase and Sale of Business Assets (the "**Agreement**"), by which General Manager thereafter shall acquire from Tenant all the assets used by Tenant in connection with the operation of the Business on Parcel 1 of the Leased Property and Parcel 3. All three (3)

parcels of real property are sometimes collectively referred to as the "**Real Property**") in this Lease. The full legal descriptions for all three (3) parcels of real property shall be inserted into Exhibit A within thirty (30) days after the date of this Lease, which legal descriptions shall reflect changes on the south boundary of Parcel 1 to straighten the property line thereby affecting the size of the current bull pen. The commencement of this Lease is conditioned upon the execution and delivery of the Contract and the Agreement.

Section 2. Term.

2.1 **Initial Term.** The initial term of this Lease (the "**Initial Term**") is seven (7) years, beginning on September 1, 2000 (the "**Commencement Date**") and terminating on August 31, 2007, unless terminated earlier pursuant to the provisions of this Lease.

2.2 **Termination upon Purchase.** The Initial Term shall terminate concurrently with the General Manager's purchase of Parcels 1 and 3 of the Real Property pursuant to the terms of Section 22.1 and Exhibit B of this Lease.

Section 3. Rent. Tenant shall pay to Landlord, as rent for the Property, the following amounts, determined and payable in the manner and at the times set forth below:

3.1 **Security Deposit.** Initially, no security deposit shall be required of Tenant. However, should Tenant commit a material default under the terms of this Lease, Landlord shall then have the right to require Tenant to pay to Landlord a security deposit equal to two (2) months' rent. If a security deposit is paid, Landlord may use all or any part of the security deposit for the payment of any loss or damage occasioned by Tenant's default. If any portion of the security deposit is so used, Tenant shall, upon receipt of notice from Landlord, deposit cash with Landlord in an amount sufficient to restore the security deposit to its original amount. No interest shall be paid on the security deposit, and Landlord shall not be required to keep it separate from Landlord's general funds. Upon full and timely performance of Tenant's obligations under this Lease, the security deposit (or remaining balance thereof) shall be returned to Tenant at the expiration of the Initial Term through the General Manager's purchase of the Business and Parcels 1 and 3 of the Real Property, or upon the termination of the Contract.

3.2 **Rent.** Tenant shall pay to Landlord, as annual rent, without abatement or off-set unless expressly allowed by this Lease, the monthly amount of Ten Thousand and No/100 Dollars ($10,000.00) for Parcel 1 (and Parcel 3 when it is added to the Leased Property) and the monthly amount of One Thousand Three Hundred Fifty Dollars ($1,350.00) for Parcel 2 as long as it is a part of the Leased Property ("**Base Rent**"), payable in advance on the first (1st) day of each calendar month beginning on the Commencement Date. All rent shall be in lawful money of the United States of America. Each monthly payment of Base Rent is due on the first (1st) calendar day of each month during the Lease term without the requirement of any notice or other reminder from Landlord to Tenant. The Base Rent shall be the same regardless of whether and when Parcel 3 is substituted for Parcel 1.

3.3 **Additional Rent.** All amounts in addition to Base Rent which, pursuant to this Lease are to be paid by Tenant to or on behalf of Landlord, shall be considered **"additional rent"** for all purposes under this Lease.

3.4 **Late Fee.** If a monthly Base Rent payment is not received by Landlord by the tenth (10th) calendar day of the month, Tenant shall be charged a late fee of One Hundred and No/100 Dollars ($100.00) per day (but not to exceed One Thousand and No/100 Dollars [$1,000.00] per monthly payment) retroactive to the first (1st) day of the month for each separate monthly Base Rent payment that is late. Late fees shall be additional rent due with the monthly Base Rent payment. Tenant agrees that the late fee: (a) is a reasonable estimate of the costs that Landlord would incur by reason of a late payment, and (b) is in addition to all other rights of Landlord and shall not prevent Landlord from exercising any other right or remedy available to Landlord by reason of Tenant's failure to pay rent when due.

3.5 **Application of Payments.** Payments made by Tenant to Landlord shall first be applied to late fees, if any, then to additional rent, if any, then to any other amounts due from Tenant to Landlord, if any, and last to Base Rent, as adjusted.

3.6 **Net Lease.** The parties intend that this shall be a net lease and that all rent payable by Tenant to Landlord hereunder shall be net of all costs and expenses relating to the Property, and that all such costs and expenses paid or incurred during the term of this Lease, including, but not limited to taxes, insurance, utilities, repairs and maintenance, shall be paid by Tenant, unless otherwise expressly provided in this Lease.

Section 4. Use of the Property.

4.1 **Permitted Use.** Initially, the sole permitted use of the Property under this Lease shall be the operation of an automotive sales and service business (the **"Permitted Use"**). Any different use of the Property by Tenant shall require the prior written consent of Landlord, which consent shall not be unreasonably withheld, conditioned or delayed.

4.2 **Limitations on Use.** Except with the prior written consent of Landlord (which consent shall not be unreasonably withheld, conditioned or delayed), no industrial, manufacturing or processing activity (except as is usual and incidental to the Permitted Use) shall be conducted on the Premises. Tenant shall not: (a) use the Property in any manner that would constitute waste nor shall Tenant allow the same to be committed thereon; (b) abuse walls, ceilings, partitions, floors, wood, stone, iron work, landscaping or other parts of the Property; (c) use plumbing, fire control, fire sprinkler, electrical, security, telecommunications, heating, cooling, ventilation, elevator or other Property services, systems or facilities for any purpose other than that for which it was constructed; (d) make or permit any noise or odor objectionable to the public to emit from the Property; (e) create, maintain or permit a nuisance in or about the Property; (f) permit or do anything that is contrary to any statutes, ordinances, rules, regulations and laws of any federal, state, or local governmental body or agency; (g) permit or do anything

that is contrary to any applicable rules and regulations of the National Fire Protection Association, the applicable Fire Rating Bureau and any similar bodies; or (h) permit or do anything that is contrary to any covenant, condition or restriction contained in this Lease.

4.3 **Hazardous Material Use.** Tenant shall not cause or permit any Hazardous Material to be brought upon, kept, or used in or about the Premises or Real Property by Tenant, its agents, employees, contractors, customers, clients, guests or invitees, except as incidental to Tenant's Permitted Use of the Property. Tenant shall comply with all applicable laws and regulations regulating the use, reporting, storage, and disposal of Hazardous Material.

4.4 **Hazardous Material Definition.** As used in this Lease, the term "**Hazardous Material**" means any hazardous or toxic substance, material or waste which is or becomes regulated by any federal, state or local governmental authority or political subdivision. The term "Hazardous Material" includes, without limitation, any material or substance that is (a) defined as a "hazardous substance" under applicable federal, state or local law, (b) petroleum, (c) asbestos, (d) polychlorinated biphenyl ("PCB"), (e) designated as a "hazardous substance" pursuant to Section 311 of the Federal Water Pollution Control Act (33 U.S.C. §1321), (f) defined as a "hazardous waste" pursuant to Section 1004 of the Solid Waste Disposal Act (42 U.S.C. §6903), (g) defined as a "hazardous substance" pursuant to Section 101 of the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. §9601), (h) defined as a "regulated substance" pursuant to Section 9001 of the Solid Waste Disposal Act (Regulation of Underground Storage Tanks), 42 U.S.C. §6991, (i) considered a "hazardous chemical substance and mixture" pursuant to Section 6 of the Toxic Substance Control Act (15 U.S.C. § 2605), or (j) defined as a "pesticide" pursuant to Section 2 of the Federal Insecticide, Fungicide and Rodenticide Act (7 U.S.C. § 136).

4.5 **Disposal of Refuse.** Tenant shall store all trash and garbage within the Leased Property or in an area designed as appropriate therefor by Landlord. Tenant shall arrange for and bear the expense of prompt and regular removal of trash and garbage from the Leased Property.

4.6 **Approvals, Permits and Easements.** During the term of this Lease, Tenant shall have the right to apply for and obtain any approvals, permits or licenses from any governmental entity required for the use of the Premises as contemplated herein and, in connection therewith, Landlord agrees to cooperate, provided that all costs and expenses therefor shall be the sole obligation of Tenant.

4.7 **Security Services.** Tenant acknowledges and agrees that Landlord has no responsibility for security at the Property, and is not responsible for providing armed or unarmed guards or watchmen, monitoring systems, security systems, fences, gates or any other security or security systems. Tenant shall provide and maintain Security Services for the Property that are appropriate for Tenant's use. The term "**Security Services**" includes, but is not limited to, any watchmen, locks, fences, alarms, doors, or other services, devices, procedures, barriers or other

measures for the purpose of protecting, safeguarding, defending, or policing persons or property from any theft, vandalism or other loss or damage. Tenant may use or install fences, locks, alarms, doors or other devices to provide Security Services, and the installation of any Security Services shall be (a) consistent with the overall design and use of the Premises and Real Property, and (b) subject to the terms of this Lease regarding "alterations, improvements and additions" in Section 5 below.

Section 5. Improvements by Tenant. Tenant shall not make any alteration, improvement or addition to the Property without the prior written consent of Landlord, which consent may not be unreasonably withheld, conditioned or delayed. All alterations, improvements, and additions: (a) shall be performed at the sole cost and expense of Tenant in compliance with all laws and regulations of any federal, state, or local governmental body, and (b) shall become and remain the property of Landlord. In contracting for any alterations, improvements or additions, Tenant shall not act as the agent of Landlord.

Section 6. Quiet Enjoyment. Landlord agrees that Tenant, upon paying the rent and performing the terms of this Lease, may quietly have, hold and enjoy the Property during the term hereof.

Section 7. Taxes and Assessments.

7.1 Payment of Taxes and Assessments. During the term of this Lease, Tenant shall pay when due and before delinquency all ad valorem real property taxes levied and assessed against the value of the Real Property and improvements thereon, and all personal property taxes levied and assessed against Tenant's trade fixtures and equipment and other personal property placed upon, or owned by Tenant in, on or about the Premises or the Real Property.

7.2 Right to Contest. Tenant, at Tenant's expense, shall have the right to contest the amount or validity of all or any part of the ad valorem real property taxes and assessments required to be paid by Tenant hereunder; provided, however, that Tenant shall indemnify Landlord against any loss or liability by reason of such contest. Notwithstanding such a contest, all taxes otherwise due and payable to Landlord by Tenant shall be paid upon demand, but any refund thereof by any taxing authority shall be the property of Tenant.

7.3 New Taxes. Tenant shall reimburse to Landlord promptly upon demand any and all taxes and other charges payable by Landlord to any governmental entity (other than net income, estate and inheritance taxes) whether or not now customarily paid or within the contemplation of the parties, by reason of or measured by the rent payable under this Lease, or allocable to or measured by the area or value of the Premises and/or Real Property, or upon the use and occupancy by Tenant of the Premises and/or Real Property, or levied for services rendered by or on behalf of any public, quasi-public or governmental entity.

Section 8. Maintenance of Property; Utilities.

8.1 Routine Maintenance and Repair. Tenant shall, at its sole cost and expense, at all times be responsible for routine repairs and maintenance of the Property as shall be necessary to maintain the Property in the condition not less than the condition of the Property existing as of the commencement of this Lease, normal wear and tear excepted.

8.2 Structural and Systems Maintenance. In addition to routine repairs and maintenance as provided in Section 8.1 above, Tenant shall be responsible for paying for the structural and systems maintenance of the Property and, in connection therewith, shall (a) make the repairs and replacements necessary to maintain the structural integrity of the Premises, including repairs and maintenance of the foundations and load-bearing walls, (b) repair and maintain in good working order the roof, paved parking areas, and the heating, ventilating, air conditioning, plumbing, and electrical systems, and (c) maintain the light ballasts.

8.3 Tenant's Liability for Repairs and Maintenance. Notwithstanding any other provision of this Lease, Tenant shall be liable for and shall promptly repair all damage to the Premises or Real Property caused by Tenant or Tenant's partners, officers, directors, employees, invitees, guests, customers, clients or licensees, regardless whether the damage is caused by the negligence of Tenant or such other persons. All repairs made by Tenant shall be at least equal to the original work in class and quality. If Tenant fails to so maintain or repair, (a) Landlord (or its agents) may, but is not required to, enter the Premises at any reasonable time to perform maintenance or make repairs, and (b) Tenant shall pay to Landlord the cost of the maintenance or repairs performed by Landlord as additional rent due with the next monthly Base Rent payment.

8.4 Utilities. Tenant shall pay for all heat, air conditioning, water, light, power and/or other utility service, including garbage and trash removal and sewage disposal, including all hookup fees or charges in connection therewith, used by Tenant in or about the Premises and Real Property during the term of this Lease. Tenant shall not be liable for any interruption or failure in the supply of any utility or service to the Property.

Section 9. Insurance.

9.1 Tenant's Obligations. Tenant shall purchase and keep in force the following types of insurance in the amounts specified and in the form hereafter provided:

(a) **Fire and Extended Coverage.** A policy or policies of fire and extended coverage insurance covering the Real Property and the Premises, in an amount not less than ninety percent (90%) of the full replacement cost (exclusive of the cost of excavations, foundations and roofing), against any peril within the classification "fire and extended coverage" or, at Landlord's election, "all-risk coverage." In addition, Tenant shall purchase and keep in force rent insurance insuring Landlord against loss of rent during the period of repair or

replacement of all or any portion of the Premises in the event of loss or damage. The insurance provided for in this Section 9.1(a) may be brought within the coverage of a blanket policy or policies of insurance carried and maintained by Tenant.

(b) **Public Liability and Property Damage.** A policy or policies of comprehensive general liability insurance with broad form general liability endorsement, or equivalent, with limits of not less than One Million Dollars ($1,000,000) per person and One Million Dollars ($1,000,000) per occurrence of bodily injury and property damage combined. The policy or policies shall also insure against liability arising out of the use, occupancy or maintenance of the Premises and the Real Property. Said policy or policies shall designate Landlord as an additional insured and shall specifically insure the performance by Tenant of the indemnity agreement(s) contained in Section 16.5 of this Lease.

(c) **Tenant's Leasehold Improvements and Personal Property.** Insurance covering all of the items comprising Tenant's leasehold improvements, trade fixtures, equipment and personal property from time to time, in, on or upon the Real Property and the Premises in an amount not less than ninety percent (90%) of their full replacement cost from time to time, providing protection against any peril included within the classification "fire and extended coverage," together with insurance against sprinkler damage, vandalism and malicious mischief and earthquakes. Any policy proceeds shall be used for the repair or replacement of the property damaged or destroyed. Landlord shall have no obligation to provide any insurance with respect to the Real Property or the Premises. Except as provided herein, each of Landlord and Tenant (a) is not obligated to obtain, (b) is not obligated to be named in, (c) shall have no right to any proceeds of, and (d) waives all claims on, insurance purchased by or for the benefit of the other party.

9.2 **Policy Form.** All policies required to be provided by Tenant shall be issued in the names of Landlord and Tenant and evidence thereof shall be delivered to Landlord within ten (10) days after the date of this Lease and thereafter within thirty (30) days prior to the expiration of the term of each policy. All policies shall be with an insurer with a Best's rating of B+ or higher, and shall contain a provision that the insurer shall give Landlord twenty (20) days notice in writing in advance of any cancellation or lapse or the effective date of any reduction in the amounts of the insurance. All public liability, property damage and other casualty policies required to be provided by Tenant shall be written as primary policies, not contributing with and not in excess of coverage which Landlord may carry.

9.3 **Adjustment of Coverage.** Not more frequently than every five (5) years during the term of this Lease if, in the opinion of Landlord based on industry and local standards and Tenant's use of the Premises, the amount of public liability and property damage insurance required to be provided by Tenant is at that time not adequate, Tenant shall increase the insurance coverage as reasonably determined by Landlord to be adequate.

9.4 **Waiver of Subrogation.** To the extent permitted by their respective insurers, Landlord and Tenant (and each person claiming an interest in the Property through Landlord or Tenant, including all subtenants of Tenant) release and waive their entire right of recovery against the other for direct, incidental or consequential or other loss or damage arising out of, or incident to, the perils covered by insurance carried by each party, whether due to the negligence of Landlord or Tenant. If necessary, all insurance policies shall be endorsed to evidence this waiver.

9.5 **Failure to Insure.** If Tenant shall fail to purchase and keep in force the insurance required by this Lease, (a) Tenant shall be in default hereunder, shall be deemed to be self-insured and shall bear all risk of loss or damage, and (b) Landlord may, but shall not be required to, purchase and keep in force the required insurance, or any portion thereof, in which event Tenant shall reimburse Landlord the full amount of Landlord's cost with respect thereto within five (5) days after written demand therefor is delivered to Tenant.

Section 10. Damage or Destruction.

10.1 **Termination or Repair.** If all or any portion of the Premises or Real Property are damaged or destroyed by fire or other casualty, Landlord shall deliver to Tenant written notice within thirty (30) days of the damage or destruction stating whether the Premises and Real Property can be restored within one hundred and eighty (180) days of the damage or destruction. Landlord shall have no obligation to expend more in repairing, restoring or rebuilding than the proceeds of insurance available for such purposes. If, in Landlord's reasonable judgment, the insurance settlement, permit and construction work for repairing and rebuilding the damaged or destroyed portion of the Premises or Real Property can be completed within the 180-day period with the available insurance proceeds, Landlord shall promptly proceed to repair or rebuild the damaged or destroyed portion of the Premises or Real Property. If, in Landlord's reasonable judgment, the insurance settlement, permit and construction work for repairing and rebuilding the damaged or destroyed portion of the Premises or Real Property cannot be completed within the 180-day period with the available insurance proceeds, either Landlord or Tenant may terminate this Lease upon thirty (30) days' written notice to the other party.

10.2 **Abatement or Apportionment of Rent.** If the Lease is not terminated, and if the damage or destruction to the Premises or Real Property is not caused by the act or failure to act of Tenant, its partners, officers, employees, agents, guests, customers, clients or invitees, then a just portion of the rent shall abate as of the date of the damage or destruction until the Premises and Real Property are repaired or rebuilt. If the Lease is terminated, the rent shall be apportioned as of the date of the damage or destruction.

10.3 **Alterations, Improvements and Additions.** With respect to any damage or destruction of Tenant's alterations, improvements or additions made to the Premises, (a) this

Section 10 shall be inapplicable, (b) no abatement of rent shall occur, and (c) Landlord shall not be obligated to repair or rebuild Tenant's alterations, improvements, or additions.

Section 11. Condemnation. If all of the Premises and/or Real Property are taken or condemned by an authority for any use or purpose, this Lease shall terminate upon, and the rent shall be apportioned as of, the date when actual possession of the Premises and/or Real Property is required for the condemned use or purpose. If less than all of the Premises are taken or condemned by any authority for any use or purpose, then (a) if the remainder of the Property is not reasonably sufficient for Tenant's business purposes, then either Landlord or Tenant may terminate this Lease upon thirty (30) days' written notice of termination, or (b) the parties may continue the Lease and a just portion of the rent will abate as of the date when actual possession of condemned portion of the Premises and/or Real Property is required for the condemned use or purpose. All compensation and damages awarded for the taking of all or any portion of the Property shall be apportioned between Landlord and Tenant on the following basis: (a) if awarded separately and not as part of the general award to Landlord, Tenant shall be entitled to receive a sum equal to the excess (if any) of the rental market value of the Property for the remainder of the Lease term over the present value (as of the date of taking) of the rent which is then payable for the remainder of the Lease term, plus compensation for the loss of Tenant's trade fixtures, removable personal property, loss of business and good will, and relocation expenses, and (b) Landlord shall be entitled to the balance of the award.

Section 12. Landlord's Entry on Property.

12.1 Right of Entry. Landlord, and Landlord's authorized representatives, shall have the right to enter the Property at all reasonable times at Landlord's discretion only for either of the following purposes:

(a) To determine whether the Property is in good condition and whether Tenant is complying with this Lease;

(b) To serve, post and keep posted any notices required or allowed under the provisions of this Lease.

12.2 No Liability. Landlord shall not be liable in any manner for any inconvenience, disturbance, loss of business, nuisance or other damage arising out of Landlord's entry on the Property as set forth herein; provided, however, Landlord shall conduct its activities on the Property as allowed herein in a manner that will cause the least possible inconvenience, annoyance or disturbance to Tenant.

Section 13. Covenant Against Liens.

13.1 Liens Prohibited. Tenant agrees not to suffer or permit any lien (including, but not limited to, tax liens and liens of mechanics or materialmen) to be placed

against the Premises or Real Property. If a lien is placed against the Premises or Real Property that is directly or indirectly related to an act or failure to act of Tenant, Tenant agrees to pay off and remove such lien within ten (10) days of receipt by Tenant of notice of the lien, regardless whether Tenant contests the validity of the lien. Tenant has no authority or power to cause or permit any lien or other encumbrance created by act of Tenant, operation of laws, or otherwise to attach to or be placed upon Landlord's title or interest in the Premises or Real Property. Any lien or encumbrance shall attach only to Tenant's leasehold interest in the Property.

13.2 Failure to Pay Lien. If Tenant shall default in the paying of a prohibited lien and a suit to foreclose the same is filed, and if Tenant has not given Landlord acceptable security to protect Landlord against any loss, damage and expense with respect to such lien, Landlord may, but shall not be required to, pay the lien and any related costs, and the amount so paid, together with reasonable attorneys' fees incurred in connection therewith, shall be immediately paid by Tenant to Landlord, together with interest thereon at the prime rate of interest as announced from time to time by First Security Bank of Idaho, N.A.

Section 14. Default.

14.1 Default by Tenant. Tenant shall be in default under this Lease if any of the following shall occur (any one or more of the following herein constituting an "**Event of Default**"):

(a) Tenant fails to pay when due any monthly rent or other payment required to be paid by Tenant under this Lease within ten (10) days of its due date; provided, however, that before declaring any default in the making of any payment required under this Lease, Landlord shall provide to Tenant a written notice specifying that there has been a default in the making of a required payment, and Tenant shall have three (3) business days after receipt of that notice within which to pay the delinquent amount and prevent a default hereunder, or

(b) Tenant shall default in the observance or performance of any of Tenant's other covenants hereunder (other than the covenant to pay rent or any other sum herein specified to be paid by Tenant) and such default shall not have been cured within thirty (30) days after Landlord shall have given to Tenant written notice specifying such default; provided, however, that if the default complained of shall be of such a nature that the same cannot be completely remedied or cured within such thirty-day period, then such default shall not be a default against Tenant for the purposes of this paragraph so long as Tenant shall have promptly commenced during such default and shall proceed with all due diligence and in good faith to remedy the default complained of; or

(c) Tenant shall (1) file a voluntary petition in bankruptcy, or (2) be adjudicated bankrupt or insolvent, or (3) have a receiver or trustee appointed for all or substantially all of its business or assets on the ground of Tenant's insolvency, or (4) suffer an order to be entered approving a petition filed against Tenant seeking reorganization of Tenant

under the federal bankruptcy laws or any other applicable law or statute of the United States or any state thereof, or (5) Tenant shall make a general assignment or general arrangement for the benefit of its creditors, or (6) bankruptcy proceedings shall have been instituted against Tenant which are not withdrawn or dismissed within sixty (60) days after the institution of said proceedings; or

(d) Tenant shall remove or attempt to remove, without the prior authorization of Landlord, any of Tenant's fixtures, equipment, appliances or personal property from the Premises for any reason other than in the normal and usual operation of Tenant's business; or

(e) Tenant shall abandon the Premises.

14.2 **Remedies of Landlord.** In the event that Tenant commits, or allows to occur, an Event of Default, Landlord shall have the following remedies:

(a) **Legal and Equitable Remedies.** Landlord shall have all remedies available at law or in equity.

(b) **Termination.** Landlord shall have the immediate right, but not the obligation, to terminate Tenant's right of possession of the Property and/or, at Landlord's election, this Lease and all rights of Tenant hereunder, by giving Tenant written notice of Landlord's election to terminate. In the event that Landlord shall elect to so terminate this Lease, said election by Landlord shall, without being so expressly stated, be deemed an election by Landlord to accelerate all future rents payable under this Lease for the Initial Term or then-applicable Renewal Term to be immediately due and payable, if such acceleration shall be required to permit Landlord to enforce any of the rights and remedies hereafter provided. In the event of such termination (and acceleration), Tenant agrees to pay to Landlord and Landlord shall have the right to recover from Tenant the following:

(1) The worth at the time of award of any unpaid rent which has been earned at the time of such termination; plus

(2) The worth at the time of award of the amount by which the unpaid rent which would have been earned after termination until the time of award exceeds the amount of such rental loss Tenant proves could have been reasonably avoided; plus

(3) The worth at the time of award of the amount by which the unpaid rent for the balance of the Initial Term or Renewal Term (as applicable) after the time of award exceeds the amount of such rental loss that Tenant proves could be reasonably avoided; plus

(4) Any other amount necessary to compensate Landlord for all detriment, expense, loss or damage, including, but not limited to, all costs and expenses to re-lease or sublet the property, including the cost of alterations and remodeling required by a new tenant, attorneys' fees and real estate commissions paid or payable for this Lease or to re-lease or sublet the Property, proximately caused by Tenant's failure to perform its obligations under this Lease; plus

(5) Any other amount necessary to compensate Landlord for all other detriment, expense, loss or damage, proximately caused by Tenant's failure to perform its obligations under this Lease (including, without limitation, the payment of taxes, insurance, and operating costs to the extent provided by this Lease); plus

(6) Any other amounts owed to Landlord by Tenant, including, without limitation, any sums of money or damages provided in Sections 15.3, 15.4 or 21 of this Lease.

As used in this Section 14.2(b), the term "**rent**" shall be deemed to be and to mean the monthly Base Rent and all other sums required to be paid by Tenant pursuant to the terms of this Lease. As used in paragraphs (1), (2) and (3) of this Section, the "**worth at the time of award**" is computed by allowing interest or discounting, as the case may be, at the rate equal to the discount rate of the Federal Reserve Bank of San Francisco at the time of award. All rental amounts received from any reletting of the Property during the balance of the then-applicable term of this Lease (had termination not occurred) shall be the property of Landlord, and Tenant shall have no right or claim to such rental amounts. The rental amounts received by Landlord prior to the time of the award of damages as provided above shall constitute rental loss avoided by Landlord.

(c) **Advances.** In the event of Tenant's breach hereof, Landlord may remedy the breach for the account and at the expense of Tenant. If Landlord at any time, by reason of such breach, is compelled to pay, or elects to pay, any moneys or do any act which will require the payment of any moneys, or is compelled to incur any expense, including reasonable attorneys' fees and costs, in instituting or prosecuting any action or proceeding to enforce Landlord's rights under this Lease, the moneys so paid by Landlord, with interest from the date of payment, shall be addition rent and shall be due from Tenant to Landlord as provided in Section 3 hereof.

14.3 **Re-Entry on Termination.** In the event of the termination of Tenant's right of possession and/or this Lease by Landlord hereunder, Landlord shall have the right to re-enter the Property and remove therefrom all persons and property.

14.4 **Re-Entry on Non-Termination.** In addition to the other rights of Landlord herein provided, Landlord shall have the right without terminating this Lease, to re-enter and retake possession of the Property and collect rents from any subtenants and/or sublet in the name of Landlord or Tenant the whole or any part of the Property for the account of Tenant,

upon any terms or conditions determined by Landlord. In the event of such subleasing, Landlord shall have the right to collect any rent which may become payable under any sublease, and apply the same first to the payment of expenses incurred by Landlord in dispossessing the Tenant and in subletting the Property, including attorneys' fees, real estate commissions and repairs and, thereafter, to the payment of the rent herein required to be paid by Tenant, in fulfillment of Tenant's covenants hereunder, and Tenant shall be liable to Landlord for the rent herein required to be paid, less any amount actually received by Landlord from a sublease and, after payment of expenses incurred, applied on account of the rent due hereunder. In the event of such election, Landlord shall not be deemed to have terminated this Lease by taking possession of the Property unless notice of termination, in writing, has been given by Landlord to Tenant.

14.5 Right of Entry-Lien for Performance. In addition to any other rights of Landlord as provided in this Section 14, upon the default of Tenant, Landlord shall have the right to enter the Property, change the locks on doors to the Premises and exclude Tenant therefrom and, in addition, take and retain possession of any property on the Premises or Real Property owned by or in the possession of Tenant as and for security for Tenant's performance. Tenant hereby grants to Landlord a lien under applicable Idaho law on all of said property, which lien shall secure the future performance by Tenant of this Lease. No property subject to said lien shall be removed by Tenant from the Property so long as Tenant is in default of any monetary obligation under this Lease. No action taken by Landlord in connection with the enforcement of its rights as provided in this Section 14 shall constitute a trespass or conversion except as to persons holding prior security interests in said property, and Tenant shall indemnify, save and hold Landlord harmless from and against any such claim or demand on account thereof.

14.6 Enforcement. In the event of a default by Tenant under this Lease, Landlord may at any time, and from time to time, without terminating this Lease, enforce all of its rights and remedies under this Lease, or allowed by law or equity, including the right to recover all rent as it becomes due. The enforcement by Landlord of any rights or remedies provided in this Section 14, or allowed by law or equity, shall not constitute the election by Landlord to terminate this Lease unless such election is in a writing signed by Landlord (or Landlord's authorized agent) and delivered to Tenant.

14.7 Security Deposits. If Landlord terminates this Lease because of the default of Tenant as provided in this Section 14, or if Landlord exercises its right of possession under Section 14.4 above, without terminating this Lease, then Tenant shall immediately transfer to Landlord all security deposits previously paid to Tenant by subtenants having a right to occupy the Property at the date of said termination.

14.8 Additional Security. As additional security for Tenant's performance of this Lease, Tenant hereby assigns and sets over to Landlord as security for the performance of Tenant's obligations under this Lease, all subleases entered into by Tenant with respect to the Property, and all rents due or to become due under said subleases, subject to the right of Tenant,

by license granted to Tenant by Landlord, to collect and retain said rents, so long as Tenant is not in default under this Lease.

14.9 Mitigation. Nothing herein contained shall relieve Landlord from the obligation to make reasonable efforts to mitigate the loss or damage occasioned by a default of Tenant, provided that said obligation to mitigate shall not relieve Tenant of the burden of proof as required in this Section 14 or otherwise affect the rights and remedies available to Landlord in the event of a default by Tenant as provided in this Section, or otherwise allowed by law or equity.

14.10 Default by Landlord. Landlord shall be in default under this Lease if Landlord fails to perform or observe any covenant, agreement or condition which Landlord is required to perform or observe and the failure shall not be cured within thirty (30) days after delivery of written notice to Landlord by Tenant of the failure.

14.11 Remedies of Tenant. In the event of Landlord's default as set forth in Section 14.10, Tenant shall have all rights provided at law or in equity, except Tenant expressly waives any right to the abatement or withholding of rent payable to Landlord under this Lease. Tenant's obligation to pay rent is independent of all other rights, and Tenant may not withhold rent payments to Landlord or pay rent to other parties or into any escrow or holding account because of the default or alleged default of Landlord.

Section 15. Termination.

15.1 Events of Termination. This Lease shall terminate upon the occurrence of one or more of the following events: (a) by mutual written agreement of Landlord, Tenant and General Manager; (b) by Landlord pursuant to this Lease; (c) by Tenant pursuant to this Lease; (d) upon lapse of the Initial Term, (e) by reason of Sections 10 or 11 relating to destruction or condemnation of the Property, or (f) upon General Manager's purchase of Parcels 1 and 3 of the Real Property pursuant to Section 22.1 and Exhibit B of this Lease.

15.2 Surrender of Possession. Upon termination of this Lease, other than a termination because the General Manager shall have purchased Parcels 1 and 3 of the Real Property as provided in Exhibit B attached to this Lease and incorporated as if set forth in full, Tenant will immediately surrender possession of the Property to Landlord. Upon termination of this Lease for any reason, Tenant will immediately surrender possession of Parcel 2 to Landlord. If possession is not immediately surrendered, Landlord may re-enter and repossess the Property and remove all persons or property using such force as may be necessary without being deemed guilty of, or liable for, any trespass, forcible entry, detainer, breach of the peace, or damage to persons or property.

15.3 **Condition of Property Upon Termination or Abandonment.** Tenant, upon termination or abandonment of this Lease or termination of Tenant's right of possession, agrees as follows:

(a) **Remove Alterations.** Tenant shall not remove any alterations, improvements or additions made to the Property by Tenant or others without the prior written consent of Landlord, which consent shall not be unreasonably withheld. Tenant shall immediately remove, in a good and workmanlike manner (a) all personal property of Tenant, and (b) the alterations, improvements and additions made to the Property by Tenant as Landlord may request in writing to be removed. All damage occasioned by the removal shall be promptly repaired by Tenant in a good and workmanlike manner. If Tenant fails to remove any property, Landlord may (a) accept the title to the property without credit or compensation to Tenant, or (b) remove and store the property, at Tenant's expense, in any reasonable manner that Landlord may choose.

(b) **Restore Premises.** Tenant shall restore the Property to the condition existing on the commencement of this Lease, with the exception of (a) ordinary wear and tear, and (b) alterations, improvements and additions which Landlord has not directed to Tenant in writing to remove. If Tenant fails to properly restore the Property, Landlord, at Tenant's expense, may restore the Property in any reasonable manner that Landlord may choose.

15.4 **Holding Over.** Should Tenant continue to occupy the Property, or any part thereof, after the expiration or earlier termination of this Lease, whether with or against the consent of Landlord, such tenancy shall be from month to month. In the event of such a holding over, the obligations of Tenant shall be the same as were in effect at the date of said expiration or termination and the monthly rent to be paid by Tenant to Landlord shall be equal to one hundred twenty-five percent (125%) of the monthly rent in force and effect for the last month of the term expired or terminated.

Section 16. Claims and Disputes.

16.1 **Rights and Remedies Cumulative.** Except as expressly provided in this Lease, each party's rights and remedies described in this Lease are cumulative and not alternative remedies.

16.2 **Nonwaiver of Remedies.** A waiver of any condition stated in this Lease shall not be implied by the neglect of a party to enforce any remedy available by reason of the failure to observe or perform the condition. A waiver by a party shall not affect any condition other than the one specified in the waiver and a waiver shall waive a specified condition only for the time and in the manner specifically stated in the waiver. The acceptance by Landlord of rent or other money from Tenant after termination of the Lease, after termination of Tenant's right of possession, after the occurrence of a default, or after institution of any remedy by Landlord shall

not alter, diminish, affect or waiver the Lease termination, termination of possession, default or remedy.

16.3 **Waiver of Notice.** Except as provided in Section 14.1(a), Tenant expressly waives the service of any demand for payment of rent or for possession.

16.4 **Waiver of Claims.** Exclusive of direct damages caused by the negligence or willful misconduct of Landlord, Landlord and Landlord's partners, directors, officers, agents, servants and employees shall not be liable for any direct or consequential damages (including damages claimed for actual or constructive eviction) either to the person or property sustained by Tenant or Tenant's partners, officers, directors, employees, invitees, guests, customers, clients or licensees due to (a) any part of the Premises or Real Property not being in repair, or (b) the happening of any incident on the Premises or Real Property. This waiver shall include, but not be limited to, damage caused by cold, heat, water, snow, frost, sewage, gas, or the malfunction of any plumbing, fire control, fire detection, fire sprinkler, electrical, electronic, computer, security, telecommunication, heating, cooling or ventilation systems, facilities or installations on the Premises or Real Property.

16.5 **Indemnification.** To the extent caused by an act or failure to act of Tenant or Tenant's partners, officers, employees, invitees, guests, customers, clients or licensees, and regardless whether the act or failure to act is negligent, Tenant shall defend, indemnify and hold harmless Landlord and Landlord's partners, officers, directors, agents and employees from any liabilities, damages and expenses (including attorneys' fees and costs) arising out of or relating to (a) the Premises or Real Property, or (b) Tenant's use or occupancy of the Property.

16.6 **Hazardous Material Indemnification.** Tenant shall indemnify, defend and hold Landlord harmless from any and all claims, judgments, damages, penalties, fines, costs, liabilities or losses (including, without limitation, diminution in value of the Premises or Real Property, damages for the loss or restriction on use of rentable or useable space or any amenity of the Premises or Real Property, damages arising from any adverse impact on marketing of space, and sums paid in settlement of claims, attorneys' fees, consultant fees and expert fees) which arise during or after the Term as a result of Tenant's breach of the obligations stated in this Lease regarding Hazardous Material. This indemnification of Landlord by Tenant includes, without limitation, costs incurred in connection with any investigation of site conditions or any cleanup, remedial, removal, or restoration work required by any federal, state, or local governmental agency or political subdivision because of Hazardous Material introduced during the Lease term into the soil or ground water on or under the Premises or Real Property. Without limiting the preceding, if the presence of any Hazardous Material on the Premises or Real Property caused or permitted by Tenant results in any contamination of the Premises or Real Property, Tenant shall promptly take all actions at Tenant's sole expense as are necessary to return the Premises or Real Property to the condition existing prior to the introduction of any Hazardous Material to the Premises or Real Property.

(a) Notwithstanding any other provision of this Lease or any contrary provision of law, the obligations of Tenant pursuant to this Section 16.6 shall remain in full force and effect until the expiration of the latest period stated in any applicable statute of limitations during which a claim, cause of action or prosecution relating to the matters described herein may be brought, and until payment in full or satisfaction of any and all losses, claims, causes of action, damages, liabilities, charges, costs and expenses for which Tenant is liable hereunder shall have been accomplished.

(b) If any claim, demand, action or proceeding is brought against Landlord which is or may be subject to Tenant's obligation to indemnify Landlord as set forth under this Section 16.6, Landlord shall provide to Tenant immediate notice of that claim, demand, action or proceeding, and Tenant thereafter shall defend Landlord at Tenant's expense using attorneys and other counsel selected by Tenant and reasonably acceptable to Landlord.

16.7 Effect of Landlord Insurance on Tenant Obligations. From time to time and without obligation to do so, Landlord may purchase insurance against damage or liability arising out of or related to the Premises or Real Property. The purchase or failure to purchase insurance shall not release or waiver the obligation of Tenant set forth in this Lease. Tenant waives all claims on insurance purchased by Landlord.

16.8 Disputes. This Lease shall be governed by the laws of the State of Idaho, without regard to conflicts of laws principles. The Idaho courts have exclusive jurisdiction and Gem County is the proper venue.

16.9 Tenant's Responsibility for Prior Contamination by Hazardous Substances. Tenant agrees to indemnify, defend, protect and hold harmless Landlord from and against any and all criminal and civil claims and causes of action (including, but not limited to, claims resulting from, or causes of action incurred in connection with, the death of or injury to any person, or damage to any property), liabilities (including, not limited to, liabilities arising by reason of actions taken by any governmental agency), penalties, forfeitures, prosecutions, losses and expenses (including reasonable attorneys' fees) which directly or indirectly arise from or are caused by the presence, prior to and/or after the commencement of the Lease, in, on, under or about the Real Property or the Premises, of any Hazardous Materials. Tenant's obligations under this Section 16.9 shall include, but not be limited to, the obligation to bear the expense of any and all costs, whether foreseeable or unforeseeable, of any necessary (as required by the Laws) repair, cleanup, detoxification or decontamination of all or any portion of the Property (or any improvements located thereon), and the preparation and implementation of any closure, remedial action or other required plan or plans in connection therewith.

Section 17. Assignment and Subletting.

17.1 Restrictions on Assignment and Subletting. Except as expressly provided in Section 17.2 below, Tenant shall not transfer, assign, sublet, enter into license or

concession agreements, change ownership or hypothecate this Lease to the Real Property or the Premises (hereinafter "transfer") withou consent of Landlord, which consent may not be unreasonably withh Any transfer of this Lease, the leasehold estate created hereby, the R any portion thereof, either voluntarily or involuntarily, whether by o without the prior written consent of Landlord, shall be null and void Landlord, constitute a material default under this Lease. Tenant agre reasonable attorneys' fees and other necessary costs incurred in conn and documentation of any such requested transfer of this Lease or Te Property. The transfer of a majority of the issued and outstanding ca however, accomplished, shall be deemed an assignment of this Lease

17.2 Permitted Assignment. Notwithstanding the above, Tenant may and shall assign this Lease to the General Manage directly or indirectly controlled by the General Manager concurrently Agreement; and the term "**control**" (including the term "**controlled b** directly or indirectly, of the power to direct or cause the direction of t policies of a business entity, whether through the ownership of voting

17.3 Consent to Modifications. The assignment of the consent of Landlord shall, without being specifically so stated or a express agreement by Tenant that subsequent modifications of this Le assignee shall not (a) require any prior consent or approval of Tenant (relieve Tenant (assignor) from liability hereunder; provided, however, increase the rent or other obligations of Tenant hereunder, Tenant's (as limited to the terms of this Lease as the same existed on the date of assi

Section 18. Waiver. The waiver by Landlord of any breach of any t conditions of this Lease shall not be deemed to be a waiver of any past, of the same or any other term, covenant or condition of this Lease. The Landlord hereunder shall not be construed to be a waiver of any term o by Tenant of a lesser amount than shall be due according to the terms o deemed or construed to be other than a part payment on account of the shall any endorsement or statement on any check or letter accompanyi to create an accord and satisfaction.

Section 19. Relationship of Parties. Nothing contained in this Lea creating the relationship of principal or agent, partnership or joint ventu Tenant. Neither the method of computation of rent nor any other provi act of the parties, shall be deemed to create any relationship other than Tenant.

Section 20. Notices. Any notice or demand given under the terms of this Lease shall be in writing and shall be deemed to be delivered on the date of delivery if delivered in person or by facsimile, or on the date of receipt if delivered by U.S. Postal Service or express courier. Proof of delivery shall be by affidavit of personal delivery, machine-generated confirmation of facsimile transmission, or return receipt issued by the U.S. Postal Service or express courier. Until changed by notice in writing, notices, demands and communications shall be addressed as follows:

LANDLORD:	TENANT:	GENERAL MANAGER
Ronald O. Thomas Elaine K. Thomas 1550 S. Washington Emmett, Idaho 83617	Thomas Motors, Inc. 2121 Service Avenue Emmett, Idaho 83617 Attn: Drew Thomas	R. Drew Thomas 2121 Service Avenue Emmett, Idaho 83617

Any party shall have the right to change its above address by notice in writing delivered to the other party in accordance with the provisions of this Section 20.

Section 21. Attorneys' Fees and Costs.

21.1 General Default. If either party shall default in the payment to the other party of any sum of money specified in this Lease to be paid, or if either party shall default with respect to any other obligations in this Lease, all attorneys' fees incurred by the other party shall be paid by the defaulting party, and if said sum is collected or the default is cured before the commencement of a suit thereon, as a part of curing said default, reasonable attorneys' fees incurred by the other party shall be added to the balance due and payable or, in the case of a non-monetary default, shall be reimbursed to the other party upon demand.

21.2 Litigation. In the event either party to this Lease shall interpret or enforce any of the provisions hereof by any action at law or in equity, the non-prevailing party to such litigation agrees to pay to the prevailing party all costs and expenses, including reasonable attorneys', accountants' and appraisers' fees incurred therein by the prevailing party, including all such costs and expenses incurred with respect to an appeal and such may be included in the judgment entered in such action.

Section 22. Miscellaneous.

22.1 Sale and Purchase of Parcels 1 and 3. General Manager shall purchase Parcels 1 and 3 of the Real Property, including all improvements located on those parcels, on the terms and conditions set forth on Exhibit B attached to this Lease and incoporated by this reference as if set forth in full.

22.2 Estoppel Certificate. Either party shall, at any time, upon not less than ten (10) days' prior written notice from the other party (the "**requesting party**"), execute, acknowledge and deliver to the other party a statement in writing (a) certifying that this Lease is unmodified and in full force and effect (or, if modified, stating the nature of such modification and certifying that this Lease, as so modified, is in full force and effect) and the date to which the rent and other charges are paid in advance, (b) acknowledging that there are not, to the other party's knowledge, any uncured defaults on the part of the requesting party hereunder, or specifying such defaults if they are claimed, and (c) containing any other certifications, acknowledgments and representations as may be reasonably requested by the requesting party or the party for whose benefit such estoppel certificate is requested. Any such statement may be conclusively relied upon by any prospective purchaser or encumbrances of the Property or Tenant's leasehold estate therein. A party's failure to deliver such statement within said time shall be conclusive upon the said party (a) that this Lease is in full force and effect, without modification except as may be represented by the requesting party, (b) that there are no uncured defaults in the requesting party's performance, (c) that not more than an amount equal to one (1) month's rent has been paid in advance, and (d) that such additional certifications, acknowledgments and representations as are requested under clause (c) of the preceding sentence are valid, true and correct as shall be represented by the requesting party. If Landlord desires to finance or refinance the Property, Tenant hereby agrees to deliver to any lender designated by Landlord such financial statements of Tenant as may be reasonably required by such lender, and all such financial statements shall be received by Landlord in confidence and shall be used only for the purpose herein set forth.

22.3 Transfer of Landlord's Interest. In the event of a sale or conveyance by Landlord of the Property, other than a transfer for security purposes only, Landlord shall be relieved from all obligations and liabilities accruing thereafter on the part of Landlord (with the exception of the obligations imposed on Landlord under Section 16.9, which shall be continuing), provided that any funds in the hands of Landlord at the time of transfer in which Tenant has an interest shall be delivered to the successor of Landlord. This Lease shall not be affected by any such sale and Tenant agrees to attorn to the purchaser or assignee, provided all Landlord obligations hereunder are assumed in writing by Landlord successor.

22.4 Severability. If any term or provision of this Lease shall be determined by a court of competent jurisdiction to be invalid or unenforceable, the remainder of this Lease shall not be affected thereby and each term and provision of this Lease shall be valid and be enforceable to the fullest extent permitted by law; and it is the intention of the parties that if any provision of this Lease is capable of two (2) constructions, one of which would render the provision void and the other of which would render the provision valid, then the provision shall be interpreted to have the meaning which renders it valid.

22.5 Force Majeure. Any prevention, delay or stoppage due to strikes, lockouts, labor disputes, court orders, acts of God, inability to obtain labor or materials or reasonable substitutes therefor, governmental restrictions, governmental regulations, government

controls, enemy or hostile government action, civil commotion, fire or other casualty and other causes beyond the reasonable control of the party obligated to perform shall excuse the performance by such party for a period equal to any such prevention, delay or stoppage, provided that this Section 22.5 shall not be applicable to the obligations imposed with regard to rent and other charges to be paid by Tenant pursuant to this Lease.

22.6 **Construction.** All parties hereto have either (a) been represented by separate legal counsel, or (b) have had the opportunity to be so represented. Thus, in all cases, the language in this Lease shall be construed simply and in accordance with its fair meaning and not strictly for or against a party, regardless of which party prepared or caused the preparation of this Lease.

22.7 **Succession.** This Lease and all obligations contained herein shall be binding upon and shall inure to the benefit of the respective heirs, personal representatives, successors and assigns of the parties hereto; provided, however, that any assignment of this Lease or any part hereof shall be subject to the provisions of Section 17, above.

22.8 **Recording.** Landlord shall, promptly upon request by Tenant, execute a memorandum of lease which may be recorded by Tenant in Gem County, Idaho.

22.9 **General.** The defined term "Landlord" as used in this Lease, shall include the plural, as well as the singular. Words used in the neuter gender include the masculine and feminine, and words in the masculine or feminine gender include the neuter. The term "Landlord" shall mean only the owner or owners at the time in question of the fee title to the Property (except for purposes of Section 16.9, which applies to those persons initially executing this Lease as Landlord). With the exception of the obligations imposed under Section 16.9 (which shall continue to be binding on the persons initially executing this Lease as Landlord), the obligations contained in this Lease to be performed by Landlord shall be binding only during Landlord's respective period of ownership.

22.10 **Section Headings.** The Section headings, titles and captions used in this Lease are for convenience only and are not part of this Lease.

22.11 **Entire Agreement.** This Lease, including the Exhibits attached hereto, and the Contract of even date herewith, contain the entire agreement between the parties as of this date concerning the subject matter hereof and supersede any and all prior agreements, oral or written, between the parties concerning the subject matter hereof. The execution hereof has not been induced by either party, or any agent of either party, by representations, promises or undertakings not expressed herein or in the Contract and, further, there are no collateral agreements, stipulations, covenants, promises, inducements or undertakings whatsoever between the respective parties concerning the subject matter of this Lease or the Property which are not expressly contained herein or in the Contract.

22.12 **Time is of the Essence.** Time is of the essence with respect to the obligations to be performed under this Lease.

IN WITNESS WHEREOF, the parties hereunto executed this Commercial Lease Agreement the day and year first above written.

LANDLORD: RONALD O. THOMAS and ELAINE K. THOMAS

Ronald O. Thomas

Elaine K. Thomas

TENANT: THOMAS MOTORS, INC.

By
Ronald O. Thomas, President

GENERAL MANAGER: DREW THOMAS

R. Drew Thomas

Exhibit A

DESCRIPTION OF REAL PROPERTY

Parcel 1:

Parcel 2:

Parcel 3:

Exhibit B

SALE AND PURCHASE OF PARCELS 1 AND 3

IN CONSIDERATION of the agreement by Tenant to lease from Landlord the Property covered by the foregoing Lease, and for other good and valuable consideration, THE PARTIES AGREE AS FOLLOWS:

1. **Right and Obligation to Purchase.** Landlord and General Manager hereby agree that Landlord shall sell, and General Manager shall purchase Parcels 1 and 2 of the Real Property (the "**Purchased Real Property**"), including all improvements located on those parcels, pursuant to the terms set forth in this Exhibit B.

2. **Exercise of Right and Obligation to Purchase.** At any time effective no earlier than September 1, 2005 and no later than September 1, 2007, upon at least ninety (90) days advance notice to Landlord, and provided that Tenant is not in default under the Lease, General Manager shall exercise his right and obligation to purchase the Purchased Real Property, but neither parcel alone, by delivering to Landlord a written notice to that effect (the "**Notice of Purchase**").

3. **Purchase Price.** General Manager shall pay Landlord the total purchase price of Nine Hundred Thousand and No/100 Dollars ($900,000.00) for the Purchased Real Property.

4. **Commitment for Title Insurance.** Within ten (10) business days after General Manager delivers to Landlord the Notice of Purchase pursuant to Paragraph 2, Landlord shall obtain, at Landlord's cost and expense, and deliver to General Manager a current commitment for title insurance ("**Commitment**") issued by a title company selected by Landlord doing business in Gem County, Idaho (the "**Title Company**"). Such Commitment shall evidence that the Purchased Real Property is free and clear of all liens, encumbrances or exceptions, excepting current general taxes, assessments, easements of record, covenants and restrictions of record, zoning regulations, and such other exceptions to title as are usual and normal on property of the type and in the vicinity of the Purchased Real Property and which have been specifically approved by General Manager in writing. No exception that shall have been created by Tenant through the action or omission of the General Manager or that shall have been created by General Manager during the term of the Contract shall be the basis for objection by General Manager to the condition of title of the Purchased Real Property. Said Commitment may also evidence an encumbrance or encumbrances which will be paid in full by Landlord at the closing of the purchase.

5. **Condition of Property.** The parties acknowledge that General Manager, having been responsible for the actions of Tenant as a party in possession of the property pursuant to the Lease, is fully familiar with and knowledgeable of the physical condition of the

land and improvements comprising the Purchased Real Property and shall purchase same in an "AS IS" condition, with all faults and without representation or warranty of any kind from Landlord concerning condition, suitability or otherwise.

6. Closing of the Purchase.

(a) The closing of the purchase by General Manager shall occur not earlier than and not later than the dates specified in Paragraph 2 above.

(b) At the closing, which shall be conducted by the Title Company issuing the Commitment described in Paragraph 4 above, Landlord shall deliver a good and sufficient, executed and acknowledged Warranty Deed in favor of General Manager, and General Manager shall deliver to the Title Company as escrow/closing agent the purchase price, plus all rent and other amounts payable by Tenant or General Manager. Each party shall pay one-half (1/2) of the fee charged by the Title Company for closing the transaction.

(c) Real estate taxes and assessments for the then current year shall be paid by Tenant (as required under the Lease) and Landlord shall purchase and provide to General Manager a Standard Coverage Owner's Policy of Title Insurance (the "**Title Policy**"), which shall be in an amount equal to the purchase price, insuring General Manager's title to the Purchased Real Property, subject only to usual printed exceptions, and the exceptions to title as set forth in the Commitment (excluding any encumbrance which is to be paid by Landlord at closing), which exceptions have been specifically approved by General Manager in writing, and any encumbrance or other exception caused by or attributable to Tenant through the action or omission of the General Manager or caused or attributable to General Manager. In the event the Title Policy as provided by this Paragraph 6(c) cannot, following the closing, be issued by the Title Company in the form required in this Exhibit B, the right and obligation to purchase and any subsequent agreement between Landlord and General Manager obligating Landlord to sell and General Manager to purchase the Purchased Real Property shall be null and void, at General Manager's option.

(d) If the transaction fails to close because of the default of a party, in addition to any other remedies at law or in equity available to the other party, the defaulting party shall reimburse the other party for all costs and expenses incurred by the other party in connection with the transaction, including, but not limited to, reasonable attorneys' fees, appraisal fees and Title Company charges, and the Lease shall continue in full force and effect for the remainder of its term, if any.

7. Termination of Right and Obligation to Purchase. The right and obligation to sell and purchase the Purchased Real Property shall terminate and be of no further force or effect upon the occurrence of the following:

(a) The termination of the Lease between Landlord and Tenant, as described above, for any reason, including, but not limited to, the default of Tenant thereunder.

(b) The early termination of the Contract by Tenant.

Upon such termination, the right and obligation to sell and purchase the Purchased Real Property shall end and the rights and obligations of the parties hereunder shall terminate and be of no further force and effect. In the event the right and obligation to purchase the Purchase Real Property terminates as provided in this Exhibit B, the right to purchase the Purchased Real Property shall no longer be available to General Manager, and Landlord shall have no obligation to sell or convey the Purchased Real Property to General Manager. In the event the right and obligation to purchase the Purchased Real Property terminates as provided herein, Landlord may terminate this Lease, which termination shall be effective six (6) months following delivery of Landlord's written notice to Tenant and General Manager of such termination, unless this Lease otherwise terminates earlier by the expiration of the Initial Term.

8. Notices. Any notice required to be given hereunder shall be in writing and shall be mailed or delivered in the manner provided in Section 20 of the Lease.

9. Assignment. General Manager shall not have the right to assign the right and obligation to purchase the Purchased Real Property or any interest herein, except as provided in Section 17.2 of this Lease, without the prior written consent of Landlord, which consent may not be unreasonably withheld.

10. Time. Time is of the essence of the right and obligation to purchase the Purchased Real Property granted by Landlord to General Manager hereunder.

11. Certificate of Non-Foreign Status. Landlord is not a foreign person, nonresident alien, foreign corporation, foreign partnership, foreign trust or foreign estate, as those terms are defined in the Internal Revenue Code of 1986, as amended (the "**Code**") and the Income Tax Regulations promulgated thereunder. At the close of escrow, Landlord shall deliver to General Manager a certificate of non-foreign status in a form satisfactory to General Manager ("**Non-Foreign Certification**"). In the event Landlord shall not deliver such Non-Foreign Certification to General Manager at the close of escrow, General Manager may withhold ten percent (10%) of the purchase price and pay such withholding to the Internal Revenue Service pursuant to Section 1445 of the Code.

12. Escrow. On or before the date of the closing (as above provided), the parties shall deposit the funds and documents hereafter described into escrow:

(a) **Landlord.** Landlord shall deposit the following:

(1) The duly executed and acknowledged Landlord's Warranty Deed;

(2) The Non-Foreign Certification duly executed y Landlord under penalty of perjury;

(3) Evidence reasonably satisfactory to General Manager that all necessary action on the part of Landlord has been taken with respect to the execution and delivery of the Warranty Deed and the other ancillary documents and instruments so that all of said documents are or will be validly executed and delivered and will be binding on Landlord; and

(4) Such other instruments and/or documents as may be required to effect the agreement herein made.

(b) **General Manager.** General Manager shall deposit the following:

(1) The purchase price of the Purchased Real Property; unless the parties otherwise mutually agree upon the terms by which Landlord shall receive instead General Manager's promissory note for some portion of the purchase price, which promissory note shall include a mutually agreed interest rate and amortization schedule, and which promissory note shall be secured by a first deed of trust on the Purchased Real Property;

(2) Additional cash in the amount necessary to pay all amounts due and payable under the Lease and General Manager's share of the closing costs and pro-rations, as above set forth; and

(3) Such other instruments and/or documents as may be required to effect the agreement herein made.

13. Close of Escrow. When the Title Company is in a position to issue the Title Policy, and all documents and funds have been deposited with the Title Company as escrow holder, the Title Company shall immediately close the escrow as provided for hereafter. The failure of Landlord or General Manager to be in a position to close the escrow by the time set for closing shall constitute a default hereunder. The Title Company as escrow holder and closing agent shall close the escrow as follows:

(a) Record Landlord's Warranty Deed with instructions for the Gem County Recorder to deliver such Deed to General Manager;

(b) Pay the purchase price to be paid at the close of escrow, plus any amounts due and payable under the Lease, to Landlord (reduced by any amount paid to release all monetary encumbrances on the Property and by Landlord's share of the closing costs);

(c) Deliver the Title Policy to General Manager;

(d) Deliver the Non-Foreign Certification to General Manager; and

(e) Forward to Landlord and General Manager, in duplicate, a separate accounting of all funds received and disbursed for each party and copies of all executed and recorded or filed documents deposited into escrow, with such recording and file date endorsed thereon.

14. **Section 1031 Exchange.** General Manager agrees to cooperate with Landlord, if so requested by Landlord, to facilitate the close of the Purchase Real Property in a manner that will permit Landlord to comply with the provisions of Section 1031 of the Internal Revenue Code of 1986, as amended; provided, however, that such facilitation by General Manager shall be at no additional cost to General Manager.

AGREEMENT FOR PURCHASE AND SALE OF BUSINESS ASSETS

THIS AGREEMENT FOR PURCHASE AND SALE OF BUSINESS ASSETS ("**Agreement**") dated this 1st day of September 2000, is entered into by and among THOMAS MOTORS, INC., an Idaho corporation ("**Seller**"), R. DREW THOMAS, a single person ("**Buyer**"), and RONALD O. THOMAS and ELAINE K. THOMAS, husband and wife ("**Shareholders**").

In consideration of and in reliance upon the mutual covenants contained in this Agreement, the parties hereby agree as follows.

Section 1. Premises. This Agreement is made and entered into by the parties in part upon the representations and warranties contained in this Section 1, which representations and warranties are not mere recitals, but fundamental premises upon which the transaction described in this Agreement is based.

1.1 Seller is an Idaho business corporation engaged in the business of selling and servicing Chrysler, Dodge, Plymouth and Jeep motor vehicles and related parts and accessories from premises located at 2121 Service Avenue, Emmett, Idaho 83617 (the "**Business Real Property**"), under franchises issued by Daimler-Chrysler Corporation.

1.2 Buyer wishes to purchase from Seller, and Seller is willing to sell to Buyer, all assets relating to Seller's Chrysler, Dodge, Plymouth and Jeep franchise for Emmett, Idaho, conditioned upon the granting to Buyer of an exclusive franchise for the sale of new Chrysler, Dodge, Plymouth and Jeep motor vehicles in the same geographical area as Seller's franchise.

1.3 Buyer (or a business entity that Buyer shall own) also wishes to lease two (2) of the three (3) parcels of the real property and improvements which constitute the Business Real Property, and wishes eventually to purchase one (1) of those parcels and another adjoining parcel of real property. Consequently, the purchase of Seller's business assets shall be conditioned upon the execution and delivery of the Commercial Lease and Purchase Agreement among the parties and Ronald O. Thomas and Elaine K. Thomas, husband and wife, dated September 1, 2000 (the "**Lease**").

Section 2. Definitions. In this Agreement, the following words shall have the indicated meanings:

2.1 "**Closing**" shall refer to the consummation of the transaction contemplated under this Agreement in accordance with the terms hereof, and "**Closing Date**" shall refer to September 1, 2001.

2.2 **"Seller's Business"** shall refer to any and all activities conducted by Seller in Emmett, Idaho, relating to the marketing and sale of new Chrysler, Dodge, Plymouth and Jeep motor vehicles and associated parts and accessories, and the repair and servicing of new or used Chrysler, Dodge, Plymouth and Jeep motor vehicles.

2.3 **"Purchased Assets"** shall refer to those assets which are identified in Section 3 as being purchased and sold by the parties under this Agreement. The Purchased Assets specifically shall not include Seller's accounts receivable and Franchisor holdbacks, which shall be retained by Seller.

2.4 **Seller's "Equipment"** shall refer to all non-inventory items of tangible personal property presently owned or used by Seller in connection with Seller's Business, including all of Seller's machinery, tools, signs, office equipment, computer equipment, computer programs, microfiches, parts lists, repair manuals, sales or service brochures, furniture and fixtures, and all of Seller's leasehold improvements to the Business Real Property. Within twenty (20) days after the Date of this Agreement, Seller shall provide to Buyer a list of the "Certain Excluded Equipment" being retained by Seller, which list shall be attached to this Agreement as Exhibit "A" and which list shall include, without limitation, a grinder and a brake lathe. The parties recognize and agree that Seller's Equipment does NOT include any assets of Thomas Auto Parts, Inc., which also operates on the Business Real Property and whose assets include its fixtures, equipment and inventory of motor vehicle parts and accessories.

2.5 **Seller's "Intangible Assets"** shall refer to Seller's telephone and fax numbers, service customer lists, sales customer lists, vehicle sales records, vehicle service records, all rights of Seller under contracts assigned to and assumed by Buyer pursuant to this Agreement, all goodwill associated with Seller's Business, and all other intangible rights and interests of any value relating to Seller's Business; provided, however, that Seller's Business name ("Thomas Motors") is included within the Intangible Assets being sold by Seller hereunder.

2.6 **"Business Real Property"** shall refer to all of Seller's rights under the Lease, including, without limitation, the rights to lease certain of the parcels described in the Lease and the rights and obligation to purchase certain of the parcels described in the Lease pursuant to the terms of Exhibit B to the Lease.

2.7 **"Franchisor"**shall refer to Daimler-Chrysler Corporation.

2.8 **"New Vehicle"** shall refer to a Chrysler, Dodge, Plymouth and Jeep motor vehicle which: (A) is unregistered and unused, (B) is from the 1999, 2000 or 2001 model year, (C) has been driven for less than two hundred (200) odometer miles, and (D) may be represented or warranted to consumers as "new" under Idaho law. **"Rollback Vehicle"** shall mean an unregistered vehicle from the 1999, 2000 or 2001 model year which has been sold to a customer by Seller but returned because of the customer's inability to obtain financing for the purchase.

"Demonstrator Vehicle" shall mean an unregistered vehicle from the 1999, 2000 or 2001 model year which has been used and operated by Seller on dealer plates for sales demonstration purposes. **"Used Vehicle"** shall mean any vehicle which is not a New Vehicle, a Demonstrator Vehicle or a Rollback Vehicle as defined in the three preceding sentences.

2.9 **"Date of this Agreement"** shall refer to the first date upon which this Agreement has been signed by all of the parties.

Section 3. Purchased Assets. Seller agrees to sell to Buyer, and Buyer agrees to purchase from Seller, those assets of Corporation specifically identified in Sections 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13 of this Agreement (the **"Purchased Assets"**). Corporation's accounts receivable and Franchisor holdbacks specifically are excluded from this transaction.

Section 4. Inventory of New Vehicles, Demonstrator Vehicles and Rollback Vehicles. Buyer shall purchase Seller's entire inventory of new Chrysler, Plymouth, Dodge and Jeep motor vehicles, as that inventory exists on the Closing Date. Buyer also shall purchase Seller's entire inventory of Demonstrator Vehicles and Rollback Vehicles. Immediately prior to Closing, Buyer and Seller shall jointly review Seller's outstanding purchase orders for New Vehicles ordered from Seller by customers but not delivered prior to Closing. At Closing, Seller shall assign to Buyer, and Buyer shall assume from Seller, all of Seller's rights (including customer deposits) and obligations (including sales commissions) under such purchase orders. At Closing, Seller shall reimburse Buyer for all deposits made to Seller with respect to ordered but undelivered New Vehicles.

Section 5. Inventory of Used Vehicles. Buyer shall purchase Seller's entire inventory of Used Vehicles, as that inventory exists at Closing, including Seller's parts trucks, service vehicles and courtesy vehicles. Those Used Vehicles that are not financed through Seller's flooring line of credit with First Security Bank of Idaho, N.A., however, shall not be part of the Fixed Purchase Price, but Buyer instead shall pay for those Used Vehicles pursuant to Section 14.2.

Section 6. Inventory of New Parts and Accessories. Buyer shall purchase Seller's entire inventory of vehicle parts and accessories manufactured by Franchisor and/or third party suppliers, as that inventory exists on the Closing Date. Buyer shall purchase that entire inventory "AS IS" as of the Closing Date. Prior to Closing, Seller shall maintain Seller's inventory of parts and accessories at a level consistent with good business practices and Seller's normal and regular course of business.

Section 7. Equipment. Buyer shall purchase Seller's Equipment. Buyer acknowledges that Seller is retaining, and is not selling to Buyer those excluded items of Seller's Equipment, as contemplated in Section 2.4.

Section 8. Supplies. Buyer shall purchase all of the gas, oil, nuts, bolts, and other automotive and office supplies which are held for use in Seller's Business.

Section 9. Contractual Rights and Obligations. At Closing, Buyer shall assume all rights and obligations of Seller under all equipment leases and other contracts. Seller warrants that all of Seller's obligations under those contracts are current as of the Date of this Agreement. Buyer agrees to indemnify Seller against all obligations under those contracts, whether they relate to periods before or after Closing.

Section 10. Repair Work in Progress. Buyer shall purchase all of Seller's vehicle repair work-in-progress (in-house and subcontracted).

Section 11. Intangible Assets. Buyer shall purchase all of Seller's Intangible Assets.

Section 12. Seller's Cash, Bank Accounts, and Notes Receivable. Buyer shall purchase all of Seller's cash, banking accounts and deposits, and notes receivable. Buyer shall take such actions as Buyer deems appropriate to collect those notes receivable, and Seller shall not be liable to Buyer to the extent that any of Seller's notes receivable are not collected by Buyer. Buyer shall retain for Buyer's own account any payment with respect to Seller's notes receivable arising out of the operation of Seller's Business prior to Closing.

Section 13. Franchisor Credits. Buyer shall purchase all of Seller's credits, deposits or other amounts due it by Franchisor as of the Date of this Agreement, except for Franchisor holdbacks that shall be retained by Seller .

Section 14. Purchase Price and Payment.

14.1 **Fixed Purchase Price.** Buyer shall pay Seller, as the total purchase price for the Purchased Assets (other than those Used Vehicles described in Sections 5 and 14.2) the amount of Eight Hundred Fifty Thousand and No/100 Dollars ($850,000.00), as such amount may be reduced by distributions made to Shareholders prior to the Closing Date pursuant to the terms of that certain Management Contract dated September 1, 2000 between the parties ("**Fixed Purchase Price**"). Buyer shall pay Seller the Fixed Purchase Price in monthly installments amortized over a period of twenty (20) years from and after the Closing, including interest at the prime rate of interest charged by First Security Bank of Idaho, N.A. plus two hundred (200) basis points, with the amortization to be adjusted concurrently with each adjustment of such prime rate of interest; provided, however, that the interest in no event shall be less than ten percent (10%). Notwithstanding such amortization schedule, Buyer shall pay Seller the entire unpaid balance of the Fixed Purchase Price and all accrued interest on September 1, 2008.

14.2 **Additional Purchase Price.** In addition to the Fixed Purchase Price provided in Section 14.1, Buyer shall pay Seller, as the purchase price for each Used Vehicle that is not financed through Seller's flooring line of credit with First Security Bank of Idaho, N.A.,

Seller's cost as reflected on its books and records for such Used Vehicle at the time Buyer sells each such Used Vehicle.

Section 15. Assumed Liabilities. In addition to the purchase of the Purchased Assets, Buyer also shall, in conjunction with such purchase, assume and take responsibility for any and all liabilities, debts or obligations of Seller (including Seller's trade payables, account payables, notes payable to Shareholders and obligations to employees), exclusive of any income tax liabilities of Shareholders.

Section 16. Warranties of Seller. Seller and Shareholders make the following warranties to Buyer, with the intent that Buyer rely thereon:

16.1 **Corporate Organization.** Seller is a corporation organized, validly existing, and in good standing under the laws of the State of Idaho. Seller is qualified to do business in the State of Idaho, and has full power and authority to own, use, and sell its assets.

16.2 **Corporate Authority.** Seller's Board of Directors and Shareholders have authorized the execution and delivery of this Agreement to Buyer and the carrying out of its provisions. This Agreement will not violate any judicial, governmental or administrative decree, order, writ, injunction, or judgment, and will not conflict with or constitute a default under Seller's bylaws, or any contract, agreement, or other instrument to which Seller is a party or by which it may be bound.

16.3 **Employee Issues.** No employees of Seller are members of any union. Within ten (10) days after the Date of this Agreement, Seller shall provide to Buyer the following: (A) a census of Seller's employees, (B) a written disclosure of all benefits made available to Seller's employees (including qualified and non-qualified retirement plans), and (C) access to all personnel files for Seller's employees. All employee benefit plans maintained by Seller for its employees shall be fully funded prior to Closing. Seller shall pay all wages, commissions, accrued vacation pay and other accrued compensation earned by Seller's employees prior to Closing (together with all accrued FICA and withholding taxes). Seller shall terminate the employment of all of Seller's employees effective as of the close of business on the Closing Date. At Buyer's sole discretion, Buyer may (but shall not be obligated to) hire any of Seller's employees.

16.4 **Undisclosed Liabilities and Contractual Commitments.** Except as otherwise disclosed in this Agreement, the following statements are true as of the Date of this Agreement and shall be true at Closing: (A) Seller does not have any liabilities which might have a material impact on Buyer's use of the Purchased Assets, (B) Seller is not a party to any contracts or commitments which might have a material impact on Buyer's use of the Purchased Assets, (C) no law suit or action, administrative proceeding, arbitration proceeding, governmental investigation, or other legal or equitable proceeding of any kind is pending or threatened against Seller which might adversely affect the value of the Purchased Assets, and (D)

Seller has all licenses, permits and authorizations required by any federal, state or local governmental or regulatory agency in order to operate Seller's Business, and knows of no reason why any such license or permit might be subject to revocation. If any claim is asserted against Buyer after Closing with respect to any obligation of Seller which Seller has failed to disclose to Buyer in writing, or which Seller has disclosed but failed to pay, then Buyer shall give prompt written notice of that claim to Seller. Seller shall indemnify Buyer with respect to all such obligations.

16.5 **Condition of Equipment.** Each item of Seller's Equipment shall be sold "AS IS" as of the Closing Date. Seller will continue to perform routine maintenance and repairs with respect to Seller's Equipment prior to Closing.

16.6 **Good Title.** Seller has, and shall transfer to Buyer at Closing, good and marketable title to all of the Purchased Assets, free and clear of all security interests, liens, equitable interests, leases, assessments, restrictions, reservations, or other burdens of any kind, other than those existing in favor of First Security Bank of Idaho, N.A. and assumed by Buyer. All current and accrued taxes which may become a lien against any of the Purchased Assets shall have been paid by Seller prior to Closing (including property taxes, sales taxes and excise taxes).

16.7 **Franchisor's Consent.** Seller shall take all actions which are reasonably necessary on Seller's part to obtain the consent of the Franchisor to the issuance to Buyer of an exclusive franchise for the sale of new Chrysler, Dodge, Plymouth and Jeep motor vehicles in the same geographical area as Seller's current franchise in Emmett, Idaho.

Section 17. Conduct of Business Pending Closing. Seller warrants that during the period beginning on the Date of this Agreement and ending at Closing: (A) Seller shall continue to operate Seller's Business in the usual and ordinary course, and in substantial conformity with all applicable laws, ordinances, regulations, rules or orders; (B) Seller shall not allow any liens to be placed against any of the Purchased Assets unless those liens are discharged prior to Closing; (C) Seller shall not take any action which may cause a material adverse change in the operations of Seller's Business; (D) Seller shall not conduct any sale which shall use the words or phrases "Going Out of Business Sale" or other words or phrases having similar meanings; and (E) Seller shall use its best efforts to preserve the value of the Chrysler, Dodge, Plymouth and Jeep franchise in Emmett, Idaho. Notwithstanding the warranties made by Seller in this Section 17, Buyer acknowledges and agrees that Buyer shall be responsible for the performance of those warranties pursuant to the terms of that certain Management Contract dated September 1, 2000.

Section 18. Representations and Warranties of Buyer. Buyer hereby makes the following representations and warranties to Seller, with the intent that Seller rely thereon: This Agreement will not violate the provision of any judicial, governmental or administrative decree, order, writ, injunction, or judgment, or conflict with or constitute a default under, any contract, agreement, or other instrument to which Buyer is a party.

Section 19. Additional Conditions Precedent to Buyer's Obligations. The obligation of Buyer to close this transaction is subject to each of the following conditions (each of which is for the benefit of Buyer and may be waived by Buyer), and Buyer shall have the right to rescind this Agreement if any of the following conditions is not satisfied in accordance with its terms:

19.1 Buyer shall have obtained from Franchisor, prior to the Closing Date, an exclusive franchise to sell new Chrysler, Dodge, Plymouth and Jeep motor vehicles in the same geographical area as Seller's current franchise in Emmett, Idaho (as evidenced by the issuance to Buyer by Franchisor of an appropriate Dealership Sales and Service Agreement, and the approval of Buyer as the publicly-owned Dealer-Operator of the franchise), and Buyer agrees to use its best reasonable efforts to obtain that franchise.

19.2 Buyer shall be reasonably satisfied with any facility improvement requirements which are imposed by Franchisor.

19.3 All of Seller's agreements and warranties set forth in this Agreement shall be true, correct, complete and not misleading at Closing; provided that Buyer's decision to close this transaction shall not release Seller from liability to Buyer for any warranty which is subsequently determined to be incorrect, incomplete or misleading.

Section 20. Closing. The parties shall make all reasonable efforts to close the purchase and sale under this Agreement at or before 5:00 p.m., Mountain Daylight Time, on or before the Closing Date, at the offices of Seller, or at such other location as shall be selected by mutual agreement of the parties.

20.1 If this transaction closes as provided in this Agreement, then actual possession and all risk of loss, damage or destruction with respect to the Purchased Assets, shall be deemed to have been delivered to Buyer at 11:59 p.m., Mountain Daylight Time, on the Closing Date.

20.2 At Closing, and coincidentally with the performance of the obligations to be performed by Buyer at Closing, Seller shall deliver to Buyer the following: (A) all bills of sale, assignments and other instruments of transfer, in form and substance reasonably satisfactory to Buyer, which shall be necessary to convey the Purchased Assets to Buyer; and (B) all other documents required under this Agreement.

20.3 At Closing, and coincidentally with the performance of all obligations required of Seller at Closing, Buyer shall deliver to Seller the following: (A) payment for the Purchased Assets; and (B) all other payments and documents required under this Agreement. Buyer shall be responsible for all sales taxes payable in connection with the transaction.

20.4 If Closing does not take place on or before the Closing Date because there has been a failure of any condition precedent set forth in Section 19, then: (A) all rights and

obligations of both parties under this Agreement shall terminate, and (B) this Agreement and all predecessor agreements shall thereafter be void and of no effect.

20.5 Both parties agree to make a good faith effort to execute and deliver all documents and complete all actions necessary to consummate this transaction.

Section 21. Survival of Representations. All representations, warranties, indemnification obligations and covenants made in this Agreement shall survive the Closing, and shall remain in effect until the expiration of the latest period allowable in any applicable statute of limitations.

Section 22. Assignment by Buyer. Buyer shall have the right to assign all of its rights and obligations under this Agreement to a business entity owned exclusively by Buyer.

Section 23. Lease and/or Purchase of Business Real Property. As a condition to the Closing of the transaction contemplated under this Agreement, Seller shall assign to Buyer (or a related entity) the Lease, including, without limitation, its terms regarding the lease of Parcels 1 and 2 of the Business Real Property, the future substitution of Parcel 3 for Parcel 2 during the term of the Lease, and the purchase of Parcels 1 and 3 of the Business Real Property.

Section 24. Miscellaneous.

24.1 There are no oral agreements or representations between the parties which affect this transaction, and this Agreement supersedes all previous negotiations, warranties, representations and understandings between the parties. True copies of all documents referenced in this Agreement are attached to this Agreement. If any provision of this Agreement shall be determined to be void by any court of competent jurisdiction, then that determination shall not affect any other provision of this Agreement, and all other provisions shall remain in full force and effect. If any provision of this Agreement is capable of two (2) constructions, only one (1) of which would render the provision valid, then the provision shall have the meaning which renders it valid. The section headings in this Agreement are for convenience purposes only, and do not in any way define or construe the contents of this Agreement.

24.2 This Agreement shall be governed and performed in accordance with the laws of the State of Idaho. Each of the parties hereby irrevocably submits to the jurisdiction of the courts of Gem County, Idaho, and agrees that any legal proceedings with respect to this Agreement shall be filed and heard in the appropriate court in Gem County, Idaho.

24.3 This Agreement may be executed in multiple counterparts, each of which shall be an original, and all of which shall constitute a single instrument, when signed by both of the parties. This Agreement shall inure to the benefit of and shall be binding upon the successors and assigns of the respective parties.

24.4 Waiver by either party of strict performance of any provision of this Agreement shall not be a waiver of, and shall not prejudice the party's right to subsequently require strict performance of, the same provision or any other provision. The consent or approval of either party to any act by the other party of a nature requiring consent or approval shall not render unnecessary the consent to or approval of any subsequent similar act.

24.5 All notices provided for herein shall be in writing and shall be deemed to be duly given when mailed by United States certified mail, postage prepaid, to the last known address of the party entitled to receive the notice, or when personally delivered to that party.

24.6 Time is of the essence of this Agreement.

24.7 Should any party hereto institute any action or proceedings to enforce or interpret any provision hereof, or for damages by reason of any alleged breach of any provision of this Agreement, the prevailing party shall be entitled to recover from the losing party or parties such amount as the court may adjudge to be reasonable attorney fees for services rendered to the prevailing party in such action or proceeding. The term **"prevailing party"** as used in this section shall include, without limitation, any party who is made a defendant in litigation in which damages and/or other relief may be sought against such party and a final judgment or dismissal or decree is entered in such litigation in favor of such party defendant.

IN WITNESS WHEREOF, the parties have executed this Agreement on the dates indicated below.

SELLER:

THOMAS MOTORS, INC.

By Ronald O. Thomas Dated: 9-16-00
Ronald O. Thomas, President

BUYER:

R. Drew Thomas Dated: 09/19/00
R. Drew Thomas

SHAREHOLDERS:

Ronald O. Thomas Dated: 9-16-00
RONALD O. THOMAS

Elaine K Thomas Dated: 9-16-00
ELAINE K. THOMAS

EXHIBIT "A"

CERTAIN EXCLUDED EQUIPMENT

1. Grinder
2. Brake lathe

MANAGEMENT CONTRACT

THIS MANAGEMENT CONTRACT ("**Contract**") dated this 1st day of September 2000, is entered into by and among RONALD O. THOMAS and ELAINE K. THOMAS, husband and wife ("**Shareholders**"), THOMAS MOTORS, INC., an Idaho corporation ("**Corporation**"), and R. DREW THOMAS, a single person ("**General Manager**").

In consideration of and in reliance upon the mutual covenants contained in this Contract, the parties hereby agree as follows:

Section 1. Employment as General Manager. Corporation hereby employs General Manager as the general manager of Corporation's business of selling and servicing Chrysler, Dodge, Plymouth and Jeep motor vehicles and related parts and accessories from premises located at 2121 Service Avenue, Emmett, Idaho 83617 (the "**Business**"), effective immediately and to continue thereafter through August 31, 2001, unless or until terminated earlier by either party pursuant to the Section 8 of this Contract.

Section 2. Responsibilities. General Manager shall have the responsibilities for any and all decisions about the conduct of the Business, including, without limitation, (A) the expenditure of revenues and other working capital, and (B) the employment, compensation and termination of all Corporation employees; provided, however, that General Manager shall not have the authority to take any action on behalf of Corporation that would cause it to incur liabilities that could not be paid through (1) Corporation's existing flooring line of credit with First Security Bank of Idaho, N.A. ("**Bank**"), (2) Corporation's revenues, or (3) additional working capital loan to be provided by Shareholders pursuant to Section 5. General Manager's responsibilities specifically shall include the financial reports to Shareholders described in Section 4.

Section 3. Compensation. General Manager shall be compensated the amount of Five Thousand and No/100 Dollars ($5,000.00) each month during the term of this Contract, payable in accordance with Corporation's regular payroll procedures, and shall receive other employee benefits that Corporation provides its salaried employees during the term of this Contract.

Section 4. Financial Reports to Shareholders. During the term of this Contract, General Manager shall meet with Shareholders to provide them a financial review of Corporation's Business, including, without limitation, a review of the status of (A) Corporation's flooring line of credit with Bank, (B) Corporation's revenues, (C) Corporation's monthly budget, (D) General Manager's projections about Corporation's need to draw upon the working capital loan to be provided by Shareholders pursuant to Section 5, and (E) such other matters as Shareholders may require. Such weekly financial reporting meetings can be suspended once Corporation has demonstrated its ability, through General Manager's leadership, to sustain its cash flow without the injection of any working capital loan for at least six (6) weeks. In addition to such weekly

financial reporting meetings, General Manager shall provide Shareholders throughout the term of the Contract with the same financial reports and at the same times as is required by Daimler-Chrysler Corporation.

Section 5. Working Capital. Shareholders shall loan to Corporation up to Three Hundred Thousand and No/100 Dollars ($300,000.00) during the first six (6) months of the term of this Contract as needed by Corporation for the purposes of (A) bringing Corporation into compliance with its flooring line of credit with Bank, and (B) additional working capital, and as Shareholders are able. In order for Corporation to draw upon any portion of such loan for additional working capital, General Manager shall give Shareholders at least fourteen (14) days written notice in advance of the date such funds are to be made available to Corporation.

Section 6. Guaranty of Flooring Line of Credit. Throughout the term of this Contract, Shareholders shall continue to guaranty Corporation's existing flooring line of credit with Bank, and Shareholders shall continue to have use of such flooring line of credit for use in Shareholders' separate used car sales business.

Section 7. Interim Distributions. To the extent that Corporation's net profit in any month during the term of this Contract exceeds Fifty Thousand and No/100 Dollars ($50,000.00), such excess shall be distributed to Shareholders as a dividend for that month and such amount shall reduce the total purchase price that General Manager otherwise would pay pursuant to Section 14 of that certain Agreement for Purchase and Sale of Business Assets dated September 1, 2000 between Corporation and General Manager (the "**Agreement**").

Section 8. Termination. The parties may terminate this Contract by mutual agreement. Corporation and Shareholders may terminate this Contract (A) upon its breach by General Manager by his incurring liabilities for Corporation in excess of the limit set forth in Section 2, (B) the determination, based upon information supplied in the weekly financial reporting meetings described in Section 4, that Corporation's operations under General Manager have not demonstrated and projections for Corporation's future operations do not demonstrate that Corporations will be able to sustain itself from cash available from operations by at least the end of the sixth month of the term of this Contract, or (C) Corporation shall not be in compliance with the terms of its flooring line of credit with Bank. General Manager may terminate this Contract at any time during its term upon fourteen (14) days' written notice to Shareholders and Corporation. Any termination of this Contract automatically shall terminate the Agreement and shall terminate General Manager's right and obligation to purchase the Purchased Real Property as defined in that certain Commercial Lease and Purchase Agreement dated September 1, 2000 among the parties.

IN WITNESS WHEREOF, the parties hereunto executed this Management Contract the day and year first above written.

SHAREHOLDERS: RONALD O. THOMAS and ELAINE K.THOMAS

Ronald O. Thomas

Elaine K. Thomas

CORPORATION: THOMAS MOTORS, INC.

By
Ronald O. Thomas, President

GENERAL MANAGER: R. DREW THOMAS

R. Drew Thomas

EXHIBIT "B"

John J. Janis (ISB No. 3599)
HEPWORTH, LEZAMIZ & JANIS
537 W. Bannock Street, Ste. 200
P.O. Box 2582
Boise, ID 83701-2582
Telephone No. (208) 343-7510
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H. Ronald Bjorkman (ISB No. 1765)
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109 N. Hays
P.O. Box 188
Emmett, Idaho 83617-0188
Telephone No. (208) 365-4136
Fax No. (208) 365-4196

Attorneys for Defendants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GEM

* * * * *

R. DREW THOMAS, Plaintiff, vs. RONALD O. THOMAS, ELAINE K. THOMAS and THOMAS MOTORS, INC., an Idaho Corporation, Defendants.	)	Case No. CV 2006-492 **DEFENDANTS' RESPONSE TO PLAINTIFF'S FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION PROPOUNDED TO DEFENDANTS**

* * * * *

COMES NOW the defendants, by and through their attorneys of record, Hepworth, Lezamiz & Janis and hereby submits Defendants' Response to Plaintiff's First Set of Interrogatories and Requests for Production Propounded to Defendants as follows:

INTERROGATORIES

INTERROGATORY NO. 1: Documents pertaining to this action. Please separately identify each document which pertains to any issue in this action.

ANSWER: The defendants object to this interrogatory on the grounds of being overly broad, unduly burdensome, and seeks a pure legal conclusion from the defendants. It would be virtually impossible for anyone to "identify," as that term is defined in these discovery requests, each and every document which could arguably "pertain to any issue" in this lawsuit. Notwithstanding and without waiving said objections, the documents which have been or will be produced by each of the parties in response to more specific or reasonable discovery requests in this action, are all likely to "pertain" to one or more of the issues in this action.

INTERROGATORY NO. 2: Communications between you and each party to this action. Please separately identify each instance of a communication, discussion, or contract between you and your representatives and each party to this action which is relevant to any issue in this action or which you intend to offer in evidence at the trial of this action for any purpose.

ANSWER: The defendants object to this interrogatory again on the grounds of being overly broad, unduly burdensome, amounting to harassment of the defendants, and again, seeks a legal conclusion to be offered to the requesting party. This case involves a son/plaintiff filing a lawsuit against his parents as the defendants. Here again, it would be impossible for anyone to list or separately "identify" every single communication of any kind that has taken place between each

of the parties and/or their representatives, who are all family members, which are arguably "relevant" to any issue in this action.

INTERROGATORY NO. 3: Witnesses with knowledge of the issues, etc. Please separately identify each person who, according to your information or knowledge, or the information or knowledge of your representatives, has knowledge of any of the issues or any of the occurrences which are relevant to this action.

ANSWER: The following individuals are at least among those who arguably have some knowledge of the issues or occurrences involved in this action:

Ron and Elaine Thomas, c/o Hepworth, Lezamiz & Janis, P.O. 2582, Boise, Idaho, 893701;

R. Drew Thomas, c/o White Peterson, P.A., 5700 East Franklin Road, Ste. 200, Nampa, Idaho, 83687-7901;

Shirley Youngstrom, c/o Lot of Cars, P.O. Box 505, Emmett, Idaho, 83617, (208)365-5050 ;

J. Robin Wilde, 207 W. 6th St., Emmett, Idaho, 83617, (208)365-1427;

Sandy Mills, c/o Lot of Cars, P.O. Box 505, Emmett, Idaho, 83617, (208) 365-5050;

James Warr, CPA, Wilson, Harrison Company, 1602 W. Franklin Street, Ste. B, Boise, Idaho 83702, (208) 365-5050;

Jan Flowers, c/o Bill Buckner Dodge, Chrysler, Jeep, Inc., P.O. Box 685, Emmett, Idaho, 83617, (208) 365-4438;

Penny Hulbert, c/o Bill Buckner Dodge, Chrysler, Jeep, Inc., P.O. Box 685, Emmett, Idaho, 83617, (208) 365-4438;

Bill Buckner, c/o Bill Buckner Dodge, Chrysler, Jeep, Inc., P.O. Box 685, Emmett, Idaho, 83617, (208) 365-4438;

Don Ovitt, c/o Bill Buckner Dodge, Chrysler, Jeep, Inc., P.O. Box 685, Emmett, Idaho, 83617, (208) 365-4438;

Dave Hull, c/o Bill Buckner Dodge, Chrysler, Jeep, Inc., P.O. Box 685, Emmett, Idaho, 83617, (208) 365-4438;

Mark Bottles, c/o Mark Bottles Real Estate Services, 5418 N. Eagle Road, Eagle, Idaho, (208) 377-5700.

The defendants reserve the right to seasonably supplement their response to this interrogatory with any additional individuals that may have knowledge of the facts or issues presented in this matter as such names are obtained or revealed in discovery in this case.

INTERROGATORY NO. 4: Experts retained by (sic) not expected to testify. Please separately identify each person retained or specially employed by you as an expert in anticipation of this litigation or in preparation for the trial of this action whom you don(sic) not expect to call as a witness at the trial of this action.

ANSWER: Defendants object to this interrogatory on the grounds that it seeks information outside the scope of permissible discovery under Rule 26 of the Idaho Rules of Civil Procedure.

INTERROGATORY NO. 5: Expert witnesses for trial. Please separately identify each person whom you may call as an expert witness at the trial of this action, and state the subject matter on which such expert witness is expected to testify, the substance of the facts to which such expert witness is expected to testify, and the substance of the opinions to which such expert witness

is expected to testify.

ANSWER: Defendants have not yet identified which expert witnesses are expected to testify at the trial of this action, but will seasonably supplement their response to this interrogatory in accordance with the Idaho Rules of Civil Procedure, and/or any applicable pre-trial orders of the Court in this action.

INTERROGATORY NO. 6: Persons supplying answers hereto. Please separately identify each person who supplied answers to these interrogatories and designated the answers or answer or part thereof supplied by such person. For any answer or part thereof not within your actual knowledge, state the sources of your information. (This interrogatory is intended to discover principal sources of information and does not seek to ascertain the identity of mere draftsmen or persons responsible for the mechanical preparation of answers.)

ANSWER: The defendants object to this interrogatory on the grounds that it seeks information which may invade the attorney client and/or work-product privileges. Notwithstanding, and without waiving said objections, the individuals who assisted in the preparation of these answers include the defendants Ron Thomas and Elaine Thomas, and their counsel.

INTERROGATORY NO. 7: Has (sic) you ever been party to any lawsuit or litigation? If your answer is anything other than an unqualified "No," then for each such case in which you were involved within the preceding fifteen (15) years, please set forth the following information specifically and in detail:

A. The title and nature of the action and a brief description of your role or part in it.

B. The name and address of the court and the case number.

C. The resulting verdict or judgment.

D. The name, address, and telephone number of all attorneys involved in the litigation.

E. The name, address, and telephone number of each person or entity, other than yourself, who was a party to the litigation.

ANSWER: The defendants object to this interrogatory on the grounds of being overly broad, unduly burdensome, amounting to harassment of the defendants, and to a significant extent seeks information that is not reasonably calculated to lead to the discovery of admissible evidence in this action. Notwithstanding and without waiving said objections, the only lawsuits the defendants can recall being involved with as a party, regard a number of small claims type matters against purchasers of vehicles not making payments for the vehicles. The defendants do not remember the details of any of these small claims matters.

INTERROGATORY NO. 8: Please describe in complete detail all facts which form the basis of your denial of the allegation that: "Defendants, however, have failed to perform and/or continuously frustrated the purpose of the agreement by, inter alia, diverting funds from Thomas Motors and/or creditor's of Thomas Motors Inc. to his and Elaine Thomas' personal use, diverting funds from Thomas Motors and/or creditor's of Thomas Motors, Inc. to unrelated entities, and unilaterally selling Thomas Motors, Inc. To a third party and, consequently, breaching the agreement with Plaintiff." By this interrogatory, Plaintiff seeks the facts, persons with knowledge, and any documents which support your denial.

ANSWER: The defendants object to this interrogatory on the grounds of being vague, confusing, unintelligible, and has the potential of being materially misleading. The interrogatory

basically seeks to discover "facts" that support the "denial of facts" that have been alleged by the plaintiff in this action. The plaintiff of course has the burden of proving those factual accusations in his Complaint. The bottom line is the plaintiff has made the referenced factual accusation in his Complaint, which the defendants believe is simply untrue, or did not happen.

INTERROGATORY NO. 9: Please describe in complete detail all facts which form the basis of your denial of the allegation that: "Defendant Ronald Thomas made this offer in an attempt to induce Plaintiff into leaving his job and begin working for the Defendants. This offer was made in an effort to procure the Plaintiff's extensive knowledge and background related to the day-to-day operation and management of a large scale new car dealership." By this interrogatory, Plaintiff seeks the facts, persons with knowledge, and any documents which support your denial.

ANSWER: The defendants object to this interrogatory on the grounds of being vague, confusing, unintelligible, and has the potential of being materially misleading. The interrogatory basically seeks to discover "facts" that support the "denial of facts" that have been alleged by the plaintiff in this action. The plaintiff of course has the burden of proving those factual accusations in his Complaint. The bottom line is the plaintiff has made the referenced factual accusation in his Complaint, which the defendants believe is simply untrue, or did not happen.

INTERROGATORY NO. 10: Please describe in complete detail all facts which form the basis of your denial of the allegation that: "After being referred to Special Assets, Plaintiff personally worked with Wells Fargo an extraordinary amount of hours at great personal sacrifice in order to maintain a flooring line of credit at Thomas Motors and assure Thomas Motors remained an open and viable entity." By this interrogatory, Plaintiff seeks the facts, persons with knowledge, and any documents which support your denial.

ANSWER: The defendants object to this interrogatory on the grounds of being vague, confusing, unintelligible, and has the potential of being materially misleading. The interrogatory basically seeks to discover "facts" that support the "denial of facts" that have been alleged by the plaintiff in this action. The plaintiff of course has the burden of proving those factual accusations in his Complaint. The bottom line is the plaintiff has made the referenced factual accusation in his Complaint, which the defendants believe is simply untrue, or did not happen.

INTERROGATORY NO. 11: Please describe in complete detail all facts which form the basis of your denial of the allegation that: "In 2002, after bringing the loan with Wells Fargo up-to-date, Thomas Motors arranged with Key Bank for a new flooring line for used cars, a new flooring line for new cars and a new note on the real property upon which Thomas Motors was situated." By this interrogatory, Plaintiff seeks the facts, persons with knowledge, and any documents which support your denial.

ANSWER: The defendants object to this interrogatory on the grounds of being vague, confusing, unintelligible, and has the potential of being materially misleading. The interrogatory basically seeks to discover "facts" that support the denial of facts that have been alleged by the plaintiff in this action. The plaintiff of course has the burden of proving those factual accusations in his Complaint. The bottom line is the plaintiff has made the referenced factual accusation in his Complaint, which the defendants believe is simply untrue, or did not happen.

INTERROGATORY NO. 12: Please describe in complete detail all facts which form the basis of your affirmative defense that: "The Plaintiff's (sic) did enter into written contractual agreements with defendants, but the Plaintiff breached material provisions of said contracts, and thereby forfeited all contractual rights attendant thereto." By this interrogatory,

Plaintiff seeks the facts, persons with knowledge, and any documents which tends to support this affirmative defense.

ANSWER: The plaintiff is already aware that the parties in this case did in fact enter into written contractual agreements with each other, and copies of said contracts have been exchanged in informal discovery already. The plaintiff is also aware, or at least should be aware from reading and signing those contracts, that those contracts impose certain specific and expressed requirements on the plaintiff to perform. The plaintiff simply failed to perform the requirements imposed upon him in those written contractual agreements with his parents, the defendants. For example, the written agreement to purchase the business assets of Thomas Motors, which concerns the primary contention of the plaintiff in this lawsuit he has brought against his own mother and father, require the plaintiff to make certain payments in order to purchase the business. The plaintiff made no such payments nor any effort to comply with the payment obligations imposed upon him under those contracts. The individuals who would have knowledge of that would of course include the plaintiff and the defendant themselves, and their respective other family members, the accountants for the respective parties, other employees of Thomas Motors, and the banking representatives for each or any of the respective parties in this action. The documents which would tend to support this affirmative defense would include the contracts themselves, and to the extent the plaintiff claims he actually made such payments, any of his financial records demonstrating a lack of any such payments.

INTERROGATORY NO. 13: Please describe in complete detail all facts which form the basis of your affirmative defense that: "The Plaintiff's claims are barred due to an impossibility of performance." By this interrogatory, Plaintiff seeks the facts, persons with

knowledge, and any documents which tend to support this affirmative defense.

ANSWER: The plaintiff agreed to purchase the business of Thomas Motors from the defendants which among the other requirements of the contract would have required him to receive approval from the auto manufacturers to approve the plaintiff to run such a franchise dealership. The defendants believe it is reasonably likely the plaintiff would not have been able to so qualify, or have been approved by the automobile manufacturers to be such a franchise, had the plaintiff made any efforts to obtain such approval.

INTERROGATORY NO. 14: Please describe in complete detail all facts which form the basis of your affirmative defense that: "The Plaintiff's claims are barred by the doctrine of release and/or accord and satisfaction." By this interrogatory, Plaintiff seeks the facts, persons with knowledge and any documents which tend to support this affirmative defense.

ANSWER: The plaintiff repeatedly advised the defendants orally that he was not going to be able to purchase the business, and informed his parents to that effect. The plaintiff also gave his defendant father verbal approval of him going ahead with selling the business, and the business was sold thereafter.

INTERROGATORY NO. 15: Attached hereto as Exhibit "A" is a copy of a "Commercial Lease and Purchase Agreement," "Agreement for Purchase and Sale of Business Assets" and "Management Contract," which purportedly contains the signatures of Plaintiff and Defendants Ronald and Elaine Thomas. Please describe and explain in full and complete detail each and every effort made by you to comply with the requirements of this alleged Agreement.

ANSWER: The defendants object to this interrogatory on the grounds of being overly broad, unduly burdensome, vague, confusing, and has the potential for being materially misleading.

The bottom line for each of the respective contracts referenced in this interrogatory is the plaintiff failed to live up to his contractual obligations, made it clear he never could live up to the contractual obligations of these contracts, thereby rendering the contracts null and void for all purposes. The defendants did not in any way prohibit or prevent the plaintiff from living up to the contractually mandated requirements in order to purchase the business; the plaintiff simply failed to do so.

REQUEST FOR PRODUCTION OF DOCUMENTS

REQUEST FOR PRODUCTION NO. 1: Please produce any and all documents related to the sale and/or auction of assets/inventory relating to Thomas Motors, Inc., Thomas Motors, Lot of Cars 2, Emmett Auto Parts (NAPA), Parts Plus, Emmett Auto Care, Thomas Auto Parts and any entity owned, operated, and/or controlled by either of the individual defendants in this action.

RESPONSE TO REQUEST NO. 1: The defendants object to this Request on the grounds of being overly broad, unduly burdensome, amounting to harassment of the defendants, and seeks information that is not reasonably calculated to lead to the discovery of admissible evidence in this action. Notwithstanding, and without waiving any such objections, attached as Exhibit "A" hereto are copies of contract documents relating to the defendants' sale of Thomas Motors and pertinent real estate.

REQUEST FOR PRODUCTION NO. 2: Please produce copies off (sic) the tax returns for calendar years 1995 through 2005 inclusive. This request encompasses both the personal tax returns for the individual defendants as well as the corporate tax returns for any entity owned, operated, and/or controlled by either of the individual defendants during the referenced period.

RESPONSE TO REQUEST NO. 2: The defendants object to this request on the

grounds that it is overbroad, unduly burdensome, constitutes an unwarranted invasion of privacy of the defendants, amounts to harassment of the defendants, and seeks information that is not reasonably calculated to lead to the discovery of admissible evidence in this action. Notwithstanding and without waiving said objections, attached as Exhibit "B" hereto are copies of the tax returns filed for Thomas Motors for the calendar years 1997 - 2005, inclusive.

REQUEST FOR PRODUCTION NO. 3: Please produce and/or make available for inspection/investigation the original document(s) which you claim and allege support your position that a valid written contract was executed between yourselves and Plaintiff.

RESPONSE TO REQUEST NO. 3: The defendants through counsel have already indicated to counsel for the plaintiff that the original contracts are in the possession of Mr. Ronald Bjorkman, co-counsel for the defendants in this action, at his office in Emmett, Idaho. Arrangements can easily be made to review such originals upon request, and counsel for the defendants will accommodate any reasonable scheduling requests to look at the originals of these agreements. The defendants are otherwise unsure what is meant by making the original agreements available for "inspection/investigation" and would request further clarification on precisely what is meant/intended by these before they will agree to it.

REQUEST FOR PRODUCTION NO. 4: Please produce copies of any and all exhibits you intend to use at the trial of this action.

RESPONSE TO REQUEST NO. 4: Defendants have not decided which exhibits will be used at the trial of this action at this point, but will seasonably supplement their response to this request in accordance with the Idaho Rules of Civil Procedure and/or any applicable pre-trial orders of the Court in this action.

REQUEST FOR PRODUCTION NO. 5: Please produce and attach copies of the education and professional qualifications of all expert witnesses you will call at trial and also attach copies of each and every report generated by each expert witness referred to herein.

RESPONSE TO REQUEST NO. 5: The defendants have not decided which expert witness will be called at the trial of this action at this point, but will seasonably supplement a response to this request in accordance with the Idaho Rules of Civil Procedure and/or any applicable pre-trial orders of the Court in this action.

REQUEST FOR PRODUCTION NO. 6: Please produce copies of any and all documents identified or relied upon by you in your Answer to Interrogatory Number 1, including, but not limited to, all documents which contain a part or all of each such answer, and all documents which you identified in said answer.

RESPONSE TO REQUEST NO. 6: Objection. Please see Answer to Interrogatory No. 1 above.

REQUEST FOR PRODUCTION NO. 7: Please produce copies of any and all documents identified or relied upon by you in your Answer to Interrogatory Number 2, including, but not limited to, all documents which contain a part or all of each such answer, and all documents which you identified in said answer.

RESPONSE TO REQUEST NO. 7: The defendants object to this Request on the grounds of being vague, confusing, and unintelligible. The referenced Interrogatory No. 2 asks about communications; it does not make reference to any documents. Notwithstanding and without waiving said objection, please refer to the Answer to Interrogatory No. 2 above.

REQUEST FOR PRODUCTION NO. 8: Please produce copies of any and all

documents identified or relied upon by you in your Answer to Interrogatory Number 3, including, but not limited to, all documents which contain a part or all of each such answer, and all documents which you identified in said answer.

RESPONSE TO REQUEST NO. 8: Defendants object to this request on the grounds of being vague, confusing and unintelligible. Interrogatory No. 3 asks only for the identity of people with knowledge of the facts of the case; it does not appear to have anything to do with identifying any documents of any kind. This Request thus does not appear to make sense.

REQUEST FOR PRODUCTION NO. 9: Please produce copies of any and all documents identified or relied upon by you in your Answer to Interrogatory Number 4, including, but not limited to, all documents which contain a part or all of each such answer, and all documents which you identified in said answer.

RESPONSE TO REQUEST NO. 9: The defendants object to this request on the grounds of being vague, confusing and unintelligible. Here again, Interrogatory No. 4 asks the defendants to identify experts not expected to testify at trial, and has nothing to do with identifying or requesting documents.

REQUEST FOR PRODUCTION NO. 10: Please produce copies of any and all documents identified or relied upon by you in your Answer to Interrogatory Number 5, including, but not limited to, all documents which contain a part or all of each such answer, and all documents which you identified in said answer.

RESPONSE TO REQUEST NO. 10: Defendants object to this request again on the grounds of vague, confusing, and unintelligible. Here again, Interrogatory No. 5 asks the defendants to identify individuals who might qualify as expert witnesses that will testify at trial; it has nothing

to do with documents.

REQUEST FOR PRODUCTION NO. 11: Please produce copies of any and all documents identified or relied upon by you in your Answer to Interrogatory Number 6, including, but not limited to, all documents which contain a part or all of each such answer, and all documents which you identified in said answer.

RESPONSE TO REQUEST NO. 11: The defendants object to this request again on the grounds of being vague, confusing, and unintelligible. Again, the interrogatory referenced asks only to identify the individuals responsible for supplying answers to the interrogatories and has nothing to do with documents. Again, this Request thus does not appear to make sense.

REQUEST FOR PRODUCTION NO. 12: Please produce copies of any and all documents identified or relied upon by you in your Answer to Interrogatory Number 7, including, but not limited to, all documents which contain a part or all of each such answer, and all documents which you identified in said answer.

RESPONSE TO REQUEST NO. 12: Defendants object to this request again on the grounds of being vague, confusing, and unintelligible and potentially seeks discovery that is irrelevant to any issue in this case. The interrogatory in question, Number 7, asks if the defendants have been party to a prior lawsuit and if so to provide some "information" about such a lawsuit. The interrogatory does not even request the defense to identify any documents in their answer, so this request does not make any sense. In any event, the defendants did not rely on any documents for Answer to Interrogatory No. 7.

REQUEST FOR PRODUCTION NO. 13: Please produce copies of any and all documents identified or relied upon by you in your Answer to Interrogatory Number 8, including,

but not limited to, all documents which contain a part or all of each such answer, and all documents which you identified in said answer.

RESPONSE TO REQUEST NO. 13: The defendants object to this request again on the grounds of being vague, confusing, and unintelligible. For further response to this Request, please refer to Answer to Interrogatory No. 8 above.

REQUEST FOR PRODUCTION NO. 14: Please produce copies of any and all documents identified or relied upon by you in your Answer to Interrogatory Number 9, including, but not limited, all documents which contain a part or all of each such answer, and all documents which you identified in said answer.

RESPONSE TO REQUEST NO. 14: The defendants object to this request again on the grounds of being vague, confusing, and unintelligible. For further response to this Request, please refer to Answer to Interrogatory No. 9 above.

REQUEST FOR PRODUCTION NO. 15: Please produce copies of any and all documents identified or relied upon by you in your Answer to Interrogatory Number 10, including, but not limited to, all documents which contain a part or all of each such answer, and all documents which you identified in said answer.

RESPONSE TO REQUEST NO. 15: The defendants object to this request again on the grounds of being vague, confusing, and unintelligible. For further response to this Request, please refer to Answer to Interrogatory No. 10 above.

REQUEST FOR PRODUCTION NO. 16: Please produce copies of any and all documents identified or relied upon by you in your Answer to Interrogatory Number 11, including, but not limited to, all documents which contain a part or all of each such answer, and all documents

which you identified in said answer.

RESPONSE TO REQUEST NO. 16: The defendants object to this request again on the grounds of being vague, confusing, and unintelligible. For further response to this Request, please refer to Answer to Interrogatory No. 11 above.

REQUEST FOR PRODUCTION NO. 17: Please produce copies of any and all documents identified or relied upon by you in your Answer to Interrogatory Number 12, including, but not limited to, all documents which contain a part or all of each such answer, and all documents which you identified in said answer.

RESPONSE TO REQUEST NO. 17: The defendants again object to this request on the grounds of being vague, confusing, and unintelligible. Once again, the interrogatory asks the defense to describe facts which form the basis of an affirmative defense. While the affirmative defense raised by Interrogatory Number 12 specifically relates to written contract agreements with the defendants, the defense has long ago been provided with copies of such contracts already.

REQUEST FOR PRODUCTION NO. 18: Please produce copies of any and all documents identified or relied upon by you in your Answer to Interrogatory Number 13, including, but not limited to, all documents which contain a part or all of each such answer, and all documents which you identified in said answer.

RESPONSE TO REQUEST NO. 18: The defendants object to this Request on the grounds of it being vague and confusing. Notwithstanding said objections, the defendants did not rely upon documents to answer Interrogatory No. 13, nor are any documents referenced in said answer. The defendants reserve the right to seasonably supplement their response to this Request if any documents are obtained or gathered which are pertinent to this defense.

REQUEST FOR PRODUCTION NO. 19: Please produce copies of any and all documents identified or relied upon by you in your Answer to Interrogatory Number 14, including, but not limited to, all documents which contain a part or all of each such answer, and all documents which you identified in said answer.

RESPONSE TO REQUEST NO. 19: The written agreements provided as attachments to the plaintiff's discovery requests herein arguably pertain to the defenses of accord and satisfaction and/or release. Otherwise, the plaintiff's agreement with the fact that he was not going to be able to purchase the business, after it was clear he was not going to do so and he failed to meet any of the contractual commitments under the written agreements, were oral discussions with his parents.

REQUEST FOR PRODUCTION NO. 20: Please produce copies of any and all documents identified or relied upon by you in your Answer to Interrogatory Number 15, including, but not limited to, all documents which contain a part or all of each such answer, and all documents which you identified in said answer.

RESPONSE TO REQUEST NO. 20: The defendants object to this request on the grounds that it is vague, confusing, and unintelligible. The interrogatory referenced does not call for the identification of any documents but instead asks the defendants to explain efforts made to comply with the written Agreements which are attached to the discovery requests. As such, the instant request to produce documents identified in answering that interrogatory makes little or no sense. Notwithstanding said objections, please refer to Answer to Interrogatory No. 15 above.

REQUEST FOR PRODUCTION NO. 21: Please produce any and all documents which document and/or demonstrate the transfer and/or sale of any item of inventory or asset

between Thomas Motors, Inc., Thomas Motors, Lot of Cars 2, Emmett Auto Parts (NAPA), Parts Plus, Emmett Auto Care, Thomas Auto Parts and any entity owned, operated, and/or controlled by either of the individual defendants in this action.

RESPONSE TO REQUEST NO. 21: The defendants object to this Request on the grounds of being overly broad, unduly burdensome, amounting to harassment of the defendants, and seeks information that is not reasonably calculated to lead to the discovery of admissible evidence in this action. The defendants further object on the grounds that this Request appears to be duplicative of Request for Production No. 1 above. Notwithstanding said objections, please refer to the Response to Request for Production No. 1 above, and the attached Exhibit "A" hereto.

DATED this 16th day of August, 2006.

HEPWORTH, LEZAMIZ & JANIS

By _____
John J. Janis

STATE OF IDAHO)
) ss
County of Gem)

RONALD O. THOMAS, being first duly sworn upon oath, deposes and says as follows:

That he is one of the defendants in the above-entitled action; that he has read the above and foregoing Defendants' Response to Plaintiff's First Set of Interrogatories and Requests for Production Propounded to Defendants and knows the contents thereof; that the facts therein stated are true as he verily believes.

Ronald O Thomas
RONALD O. THOMAS

SUBSCRIBED AND SWORN TO before me this 18th day of August, 2006 .

LORAINE LOVEGREEN NOTARY PUBLIC STATE OF IDAHO

Loraine Lovegreen
Notary Public for the State of Idaho
Residing at: Emmett, Idaho
My Commission Expires: March 15, 2010

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, with offices at 537 W. Bannock Street, Suite 200, P.O. Box 2582, Boise, Idaho 83701, and one of the attorneys for the Defendants in this matter, certifies that on this 16th day of August, 2006, he caused to be served a true and correct copy of the above and foregoing by the method indicated below, and addressed to the following:

William A. Morrow
James M. Vavrek
WHITE, PETERSON, PA
5700 E. Franklin Rd., Ste. 200
Nampa, Idaho 83687-7901

[X] U.S. Mail
[ ] Hand Delivered
[ ] Overnight Mail
[ ] Telecopy (Fax)

H. Ronald Bjorkman
Attorney at Law
109 N. Hays
P.O. Box 188
Emmett, Idaho 83617-0188

[X] U.S. Mail
[ ] Hand Delivered
[ ] Overnight Mail
[ ] Telecopy (Fax)

John J. Janis

EXHIBIT "C"

WHITE PETERSON

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JULIE KLEIN FISCHER
CHRISTOPHER D. GABBERT
WM. F. GIGRAY, III
T. GUY HALLAM **
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TODD A. ROSSMAN
JAMES M. VAVREK
TERRENCE R. WHITE ***
DENNIS P. WILKINSON

* Also admitted in CA
** Also admitted in OR
*** Also admitted in WA

August 30, 2006

VIA FACSIMILE TRANSMISSION (208) 342-2927

John J. Janis
HEPWORTH, LEZAMIZ & JANIS, CHTD.
537 W. Bannock Street
P.O. Box 2582
Boise, ID 83701-2582

Re: ***Thomas v. Thomas***
Case No. CV 2006-492

Dear John:

This letter is in response to the Defendants' responses to Plaintiff's First Set of Interrogatories and Requests for Production of Documents. Mr. Thomas is concerned by the Defendants' inadequate responses to the interrogatories and Defendants' limited production of documents. It appears the Defendants refused to provide the information requested by the interrogatories and produce the requested documents, or they simply failed to undertake the task of producing the information and documents. The purpose of this letter is to identify the Defendants' responses that appear to be defective and not in compliance with Defendants' discovery obligations pursuant to the Idaho Rules of Civil Procedure.

Request for Production No. 1: This request required the Defendants to produce any and all documents related to the sale and/or auction of the assets and inventory of various commercial entities under the Defendants' control. In response, Defendants only provide information related to the sale of Thomas Motors. While Plaintiff appreciates this information, the Defendants' response fails to adequately respond to the request for documents pertaining to the other businesses and the sale of inventory off the lot of Thomas Motors. Given the Defendants' posture in this case up to his point, this information is wholly discoverable and the objections stated are not well founded. Please provide any and all further responsive documents on or before September 8, 2006.

Request for Production No. 21: This request required the Defendants to produce any and all documents related to the transfer of assets and/or inventory **between** the various commercial entities under the Defendants' control. In response, Defendants provided only limited information duplicative of the response to Request for Production No. 1. While Plaintiff appreciates this information, the Defendants' response fails to adequately respond to the request for documents pertaining to the other businesses and the sale of inventory off the lot of Thomas Motors. Given the Defendants' posture in this case up to his point, this information is wholly discoverable and the objections stated are not well founded. Please provide any and all further responsive documents on or before September 8, 2006.

Request for Production No. 3: This request required the Defendants to make available for inspection by Plaintiff's document examiner the original documents Defendants' allege creates a contract in this matter. While the Defendants' response indicates the responsive documents are in the possession of co-counsel, Ronald Bjorkman, it does not indicate a time and place in which Plaintiff can have access to said documents in order to forward them on to his document examiner. I would request that you contact myself or William Morrow to identify a time and place where Plaintiff may gain access to these documents. If you wish some kind of stipulation which would allow a signed photocopy to be stipulated as an original in the unlikely event that the original is lost, then we would certainly do so.

Interrogatory No. 15: This interrogatory required the Defendants to identify the efforts made to comply with the alleged requirements of the "Commercial Lease and Purchase Agreement," "Agreement for Purchase and Sale of Business Assets," and "Management Contract." The response of the Defendants, however, is entirely unresponsive and fails to identify or offer any explanation regarding the Defendants conduct toward this purported agreement. Given the Defendants' posture in this case up to his point, this information is wholly discoverable and the objections stated are not well founded. Please provide any and all further responsive information on or before September 8, 2006.

Interrogatories Nos. 8, 9, 10, and 11: These interrogatories requested the specific facts relied on by the Defendants in denying certain portions of Plaintiff's Complaint. However, in responding, the Defendants merely stated that they felt the assertions were not true but failed to provide any factual support for those claims. If it is the position of the Defendants that they do not have any factual support for their denials that is one position, however, should the Defendants possess any facts that would support their denials Plaintiff is entitled to discover those facts. Accordingly, please provide any and all further responsive information on or before September 8, 2006.

In the event you are unwilling to provide the information and documents requested in the Plaintiff's written discovery and further identified and requested in this letter, the Plaintiff will have no alternative but to seek the intervention of the Court and seek a Motion to Compel.

I thank you in advance for your kind and prompt attention to this matter. Do not hesitate to contact me should you have any questions or concerns.

Very truly yours,

WHITE PETERSON, P.A.

James M. Vavrek

JMV/sw
c: Drew Thomas
sw/W:\Work\T\Thomas, R Drew 21971\Thomas Motors, Inc.000\Correspondence\janis ltr 082806.doc

EXHIBIT "D"

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Boise, ID 83701-2582

H[illegible]WORTH, LEZAMIZ & JANIS, [illegible]TD.

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Twin Falls, ID 83303-038

J. Charles Hepworth*
John J. Janis
John W. Kluksdal

*Member CA Bar

John C. Hepworth
John T. Lezamiz
Robyn M. Brody
Benjamin J. Cluff
Joel A. Beck
Wm. L. Nungester, Of Counsel

August 31, 2006

James M. Vavrek
WHITE PETERSON
5700 E. Franklin Road, Ste. 200
Nampa, Idaho 83687-7901

Re: Thomas v. Thomas
HL&J File No.: 06-2-023

Dear James:

This will respond to your letter of August 30, 2006, and the various points raised therein. I will attempt to address each of the discovery requests at issue, in the same manner your letter does.

Request for Production No. 1: We do not see the relevance of documents related to the sale and/or auction of the assets or inventory of the other commercial entities under the defendant's control. Your client's claim boils down to asserting his mother and father promised to give him one of their businesses, and his mom and dad both deny that was the case. For that reason, we thought the sale documents relating to that particular business were discoverable and produced them accordingly. However, we do not see how any sale of any of the other businesses could have any relevance to the issues presented in this case.

We are, of course, more than willing to provide any information which is reasonably calculated to lead to the discovery of admissible evidence in this action, and I appreciate the fact that you are trying to work any discovery issues out by letter. However, your letter does not do much in the way of explaining how any documents related to the sale of other businesses, that were not the subject of any alleged promise in this case, are relevant or discoverable. Instead, the only reference made in your letter that could arguably be said to deal with the relevance of this information states: "Given the Defendants' posture in this case up to his [sic] point, this information is wholly discoverable and the objections stated are not well founded." This seems to be more of a conclusion than an explanation, and does not disuade us from believing our original position on this subject is well founded.

Request for Production No. 21: This references any documents related to any purported transfer of assets or inventory between the various commercial entities. Our response to this is pretty much the same as the response to Request for Production No. 1 above, as we do not see the relevance or discoverability of any such documents, if they exist. Again, the case you filed boils down to your client claiming his parents orally promised to give him a particular business, and seeks to recover large money damages from his own parents because they sold that business to someone else. We do not believe any of the documents requested here could have anything to do with the issues raised by that basic claim.

Request for Production No. 3: This regards your request for the defendants to make the original contracts available for inspection and examination. As we said in our response, the originals are in the possession of co-counsel Mr. Bjorkman, and you are free to make arrangements to look at those documents at his office. You apparently suggest that it is our responsibility to contact you or Mr. Morrow to identify a time and place where "Plaintiff may gain access to these documents." I do not believe that to be the case. While it is true I did not specify a time and place for you to come over to Mr. Bjorkman's office to look at the documents, I thought the answer was clear that we would make those arrangements at virtually any time that was reasonable. All you would have to do is call me or Mr. Bjorkman, and I am sure that we can accommodate everyone's schedule for this, and do so quite quickly. The only thing I would like to assure is that Mr. Bjorkman is actually in the office when the "inspection" takes place.

However, our response also indicated that to the extent that your requested inspection and/or examination involves something other than looking at the documents, we requested some clarification on what is being suggested by that. Your letter suggests that you are actually seeking to take the original documents out of the possession of the defendants or their counsel altogether, and send them to some unidentified "document examiner," to perform some kind of unidentified examination. To begin with, your letter does not identify who this "document examiner" is, nor does it explain what this document examiner actually intends to do with these original documents. We believe at the very least we are entitled to get the specifics of what would actually be done with these documents, who is going to be handling them, and what exactly they are planning on doing with them, before we have to take an affirmative position on that, one way or the other.

You know as well as I do that your client's position regarding these original contracts, makes these original documents have significant evidentiary value in this case. If there is any risk that any effort on your part, or that of your expert's, would be to lose or destroy the original nature of this significant evidence, we do not believe it is just a matter of stipulating that a signed photocopy will be the equivalent of an original. On the contrary, such an eventuality would involve a spoilation of evidence, which might very well involve or trigger other evidentiary principles than the "Best Evidence" Rules.

In short, if you would actually like to just "inspect" these original documents at Mr. Bjorkman's office (i.e. come and look at them) I would ask that you contact Mr. Bjorkman's office to arrange a time that he could be there for that purpose. Again, I am sure those arrangements can be made very easily with a simple phone call. Based upon your letter, however, it does not at this point appear to me that you are actually requesting that opportunity. Instead, you are apparently requesting that we actually turn over these documents to your possession, and for you to then send them somewhere else. On that subject, the bottom line is we are not willing under the present circumstances to do that, as outlined above. I believe our position on this subject is entirely consistent with the Idaho Rules of Civil Procedure (*e.g. Rule 34),* but if you are aware of legal authority to the contrary, please let me know.

Interrogatory No. 15: This interrogatory is directed at Defendants' efforts to comply with the requirements of the contracts. As we stated in our Answer, the Defendants were required under the original contracts to turn over the business to your client, if he satisfied his contractual obligations. He did not do that. He did not make the requisite payments nor make any effort to comply with his obligations under the contract. As such, there was not much for the Defendants to do. As our responses indicate, your client made it clear that he was not going to buy the business although he had contractually agreed to do so, which thereby rendered any obligations on the part of the Defendants to do anything as void and unnecessary. I frankly do not see how this response could be considered unresponsive.

Interrogatories Nos. 8, 9, 10 and 11: There seems to be a communication disconnect here, as we believe all these interrogatories basically involve a double negative. We do honestly believe that they are very confusing interrogatories which boils down to asking someone to disprove a negative. Each of these interrogatories quotes a specific factual accusation contained in your complaint. The Defendants deny that those accusations are accurate or true. Your interrogatory then takes the additional step of asking the Defendants to provide facts to prove why their denials are accurate. That simply does not make much sense to us. Otherwise stated, our denials boil down to saying the factual accusations made by the Plaintiff that are at issue simply did not happen, or are not true, and that we do not believe the Plaintiff can prove those specific factual allegations, because they did not happen in the precise manner alleged by the Plaintiff. Again, I would remind you that Plaintiff bears the burden of proving any particular facts that he alleges to have happened a particular way; it is not the Defendants' who have the burden of proving such facts did not happen as alleged.

To be fair on this, I have to say that we struggled with these interrogatories, and we were frankly stumped by them. I have simply never had the experience of having a party making specific factual allegations against another party, which the responding party denies, and then the alleging party asking the responding party to identify facts or documents upon which they base their denial. It is of course much more common for each party to ask for facts that support the making

of, or denial of, a claim or an affirmative defense (which you had done elsewhere and we answered accordingly). This, however, asks for facts supporting a denial of facts which we believe not to have occurred. Nevertheless, I will agree to re-look at your interrogatories and our responses, and see if there is any more meaningful information that I can give you, that has not already been given.

I should also say that I appreciate your efforts at trying to resolve any disputes we have in discovery informally, notwithstanding any disagreement we may have on particular issues. We believe in fact, that most discovery disputes should be resolved by the litigants under most circumstances, although there are of course circumstances where there is no choice but to seek Court intervention. We will endeavor to be as reasonable and cooperative as we can in any of the discovery efforts in this case.

Very truly yours,

HEPWORTH, LEZAMIZ & JANIS

By _____
John J. Janis

JJJ/sf

EXHIBIT "E"

WHITE PETERSON

ATTORNEYS AT LAW

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*** Also admitted in WA

September 12, 2006

VIA FACSIMILE TRANSMISSION (208) 342-2927

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HEPWORTH, LEZAMIZ & JANIS, CHTD.
537 W. Bannock Street
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Boise, ID 83701-2582

Re: ***Thomas v. Thomas***
Case No. CV 2006-492

Dear Mr. Janis:

Thank you for your prompt response to my letter of August 26, 2006. I would, at this point, like to take the opportunity to address some of the concerns you have raised.

As you are well aware, it is my client's contention that the contracts which you claim to be applicable to this litigation are fraudulent documents. To that end, it is our desire to access the original documents and have them examined by a document examiner. It is our intention to use all available scientific methods to determine the authenticity of the signatures contained on those documents. The specifics of this testing, however, cannot be ascertained until such time the examiner has access to the documents. You can be assured the examiner will not destroy the documents as part of the testing process and the originals will be returned to your or Ron Bjorkman's custody and control following the completion of the tests. Clearly, this request is valid pursuant to I.R.C.P 34(a) and I am confident the court will grant us access to these documents should we need to seek its intervention. I hope, however, the court's intervention can be avoided. As noted in my previous correspondence, my client is willing to stipulate to allow a signed photocopy to be used as an original in the unlikely event that the original is lost - such a stipulation should suffice to overcome any application of the Best Evidence Rule.

Time is of the essence in this matter and, accordingly, I would request a date by which we may take possession of this document to be identified prior to September 15, 2006. In the

event you are unwilling to grant us access to the original document as requested in the Plaintiff's written discovery and further identified and requested in this letter and my letter of August 26, 2006, the Plaintiff will have no alternative but to seek the intervention of the Court and seek a Motion to Compel.

Finally, I would also request that you identify a date during the first week of October where Elaine Thomas would be available to be deposed.

I thank you in advance for your kind and prompt attention to this matter. Do not hesitate to contact me should you have any questions or concerns.

Very truly yours,

WHITE PETERSON, P.A.

James M. Vavrek

JMV/sw
c: Drew Thomas
sw/W:\Work\T\Thomas, R Drew 21971\Thomas Motors, Inc.000\Correspondence\Janis ltr 091206.doc

EXHIBIT "F"

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HEPWORTH, LEZAMIZ & JANIS, CHTD.

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- ESTABLISHED 1952 -

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Twin Falls, ID 83303-0389

September 13, 2006

VIA FACSIMILE - 208-466-4405
James M. Vavrek
WHITE PETERSON
5700 E. Franklin Road, Ste. 200
Nampa, Idaho 83687-7901

Re: Thomas v. Thomas
H.&J File No.: 06-2-023

Dear Mr. Vavrek:

This will respond to your letter of September 12, 2006. We still have several concerns about your request, and have several points to make in response to your letter.

1. Your letter first indicates that I am "well aware" that your client is contending the contracts which we claim to be applicable to this litigation are "fraudulent documents." I am not sure that is a fair characterization. It is my understanding your client has acknowledged actually signing these written contracts to purchase the business. As such, I do not see how they could possibly amount to "fraudulent documents." Nevertheless, I am aware your client has raised questions about who signed these documents on behalf of the defendants and when, which apparently has something to do with the "testing" you want to accomplish, which is further addressed below.

2. Your letter still does not address the basic requests we have made of you in regards to this "testing" you apparently want to accomplish. That is, you have not identified the person who would do the testing nor their credentials which would identify or explain what expertise they purport to have. In fact, we have no idea who this purported expert of yours is, where they live, or anything about them.

Equally important, if not more so, you have still not identified what kind of possible "testing" this expert might perform on these original contracts. Your letter indicates that the "specifics" of the testing cannot be ascertained until the examiner has access to the documents. I do not understand this at all. You must have something in mind as to what you want tested by a "document examiner." We believe we are entitled to this type of information before we are required to give up possession of the original contracts, which again have very significant evidentiary value in this case.

3. Your letter indicates that your request is "clearly valid" pursuant to I.R.C.P. 34(a). I am not sure that is fair either. That rule allows a party to serve a request on another party "to inspect and copy" any designated documents. We have, of course, already provided you with copies of these documents. We have also indicated an open willingness to allow you to "inspect" these documents at Mr. Bjorkman's office at virtually any time. There is nothing in this rule to my knowledge that requires a party who has possession of original documents, to actually give up possession of those original documents, and turn them over to the other party for the purpose of conducting unexplained and/or unidentified "testing" by unidentified individuals in unidentified places.

4. The bottom line is that we request that you provide us with the information we previously requested about this expert and the proposed testing. Specifically, we would like to know who this expert is, and where they are located, and their credentials that qualify them as a "document examiner." In addition, we would very much request that we be given as much information as you reasonably can as to the type of testing this expert would plan on performing, and for what purpose.

Thank you again for your time and consideration.

Very truly yours,

HEPWORTH, LEZAMIZ & JANIS

By _____
John J. Janis

JJJ/sf

John J. Janis (ISB No. 3599)
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Telephone No. (208) 365-4136
Fax No. (208) 365-4196

Attorneys for Defendants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GEM

* * * * *

R. DREW THOMAS, Plaintiff, vs. RONALD O. THOMAS, ELAINE K. THOMAS and THOMAS MOTORS, INC., an Idaho Corporation, Defendants.	Case No. CV 2006-492 **DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

* * * * *

COMES NOW the defendants in the above-entitled action, and pursuant to Rule 56 of the Idaho Rules of Civil Procedure, hereby respectfully move this Honorable Court for an order granting summary judgment on all counts of the Plaintiff's Complaint in this case. This Motion is made on the grounds and for the reasons that there are no genuine issues of material fact in establishing that the five causes of action raised by the Plaintiff are devoid of legal and/or factual merit.

This Motion is otherwise based upon the records and pleadings on file with the Court in this action, together with the following documents filed contemporaneously and in support of this Motion: (1) Defendants' Memorandum in Support of Motion for Summary Judgment; (2) Affidavit of Ronald O. Thomas in Support of Defendants' Motion for Summary Judgment; and (3) Notice of Filing Deposition Excerpts in Support of Defendants' Motion for Summary Judgment.

DATED this 19th day of July, 2007.

HEPWORTH, LEZAMIZ & JANIS

By _____
John J. Janis
Attorneys for Defendants

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, with offices at 537 W. Bannock Street, Suite 200, P.O. Box 2582, Boise, Idaho 83701, and one of the attorneys for the Defendants in this matter, certifies that on this 15th day of July, 2007, he caused to be served a true and correct copy of the above and foregoing by the method indicated below, and addressed to the following:

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GEM

* * * * *

R. DREW THOMAS,	)	
	)	
Plaintiff,	)	Case No. CV 2006-492
	)	
vs.	)	**DEFENDANTS' MEMORANDUM IN**
	)	**SUPPORT OF MOTION FOR**
	)	**SUMMARY JUDGMENT**
RONALD O. THOMAS, ELAINE K. THOMAS and THOMAS MOTORS, INC., an Idaho Corporation,	)	
	)	
Defendants.	)	

* * * * *

INTRODUCTION

This case begins with the distasteful notion of a son suing his elderly parents for substantial financial damages, all on the premise of the defendant father allegedly promising to sell his son his car dealership business upon the father's retirement, which he instead sold to third persons. While this case begins with that premise, it should end with summary judgment being granted because the alleged agreement underlying the plaintiff's claims in this case is very clearly unenforceable as a matter of law.

OPERATIVE FACTS

The following represents the facts that are pertinent to this motion which are either entirely undisputed or are as alleged by the plaintiff:

1. The defendant Ron Thomas worked in the business of selling motor vehicles for the better part of 30 years in Emmett, Idaho. He worked as a salesman for Johannsen Motors in Emmett for approximately 26 years until about 1995. At that point he purchased land and opened up his own used car sales business called "Lot of Cars." Within two years of opening that business, the owner of Johannsen Motors, for whom Ron had previously worked for numerous years, approached Ron about buying him out of Johannsen Motors. Ron eventually agreed to purchase the business. *See Ron Thomas depo, pp. 45-47.*

2. The defendant Ron Thomas and his wife/co-defendant, Elaine, purchased Johannesen Motors in 1997. As part of that purchase, Ron and Elaine sought, and eventually obtained, approval from Dodge/Chrysler to become an approved franchisee to run a new car dealership for Dodge and Chrysler. Following that approval, they renamed the new car dealership "Thomas Motors." *See Ron Thomas depo, p. 42, ll. 19-25; p. 43, l.1.*

3. According to the plaintiff, when his dad was considering buying Johannesen Motors his dad approached the plaintiff about the prospect of going to work for the new business venture as a sales manager. At the time, the plaintiff was working for Lanny Berg Chevrolet New and Used Car Dealership in Caldwell, Idaho. The plaintiff had been working for Lanny Berg for approximately 8 years. *See R. Drew Thomas depo, p. 14, ll. 2-10.* The overwhelming majority of the time the plaintiff worked for Lanny Berg was as a salesman. *See R. Drew Thomas depo, p. 15, ll. 1-20.* For the last six months of his employment there, however, the plaintiff has testified he had worked as a "new car sales manager" working under the general sales manager there (Lanny Berg, Jr.) and the owner (Lanny Berg, Sr.). *See R. Drew Thomas depo, p. 19, ll. 14-25.*

4. The plaintiff claims that he and his father had a number of discussions in 1996 and 1997 about the prospect of the plaintiff going to work for his dad at the new car dealership he was going to buy (i.e. Johannesen Motors), before the plaintiff actually agreed to do so. The substance of these discussions, again according to the plaintiff, was his dad telling him that if the plaintiff came to work for the dad's new car dealership that he was going to purchase, that upon the dad's retirement at or about 63 years old, the "dealership would be yours." *See, e.g., R. Drew Thomas depo, p. 41, ll. 10-15.* The plaintiff eventually agreed to leave Lanny Berg and work for his dad at the new car dealership and claims he started working there in the Fall of 1997. *See R. Drew Thomas depo, p. 24, ll. 1-2.* The plaintiff testifies that his agreement to leave Lanny Berg and go to work for his dad's new business was communicated to his dad "a month or two" before he actually started working there. *See R. Drew Thomas depo, p. 61, ll. 6-8.* In other words, the oral agreement allegedly reached with his dad occurred somewhere in the July or August of 1997 time frame. *Id.; see also R. Drew Thomas depo, p. 61, ll. 22-25; p. 66, ll. 1-3.* It is undisputed that all of these

discussions and/or the alleged agreement in question were oral in nature; nothing was in writing at this point. *See, e.g., R. Drew Thomas depo, p. 61, l. 2-8* At that time, the defendant Ron Thomas was 55 years old, meaning he was approximately 8 years from becoming 63 years old, specifically in April of 2005. *See Affidavit of Ron Thomas, ¶ 2 at p. 2.* It is this alleged oral "agreement" that is at the heart of the plaintiff's claims in this lawsuit. Some of the more specific factual details concerning this alleged oral agreement are addressed further below.

5. At his deposition, the plaintiff was pressed a number of times about the specifics of the purported oral agreement reached between he and his father. In fact, there are pages and pages of the plaintiff's deposition testimony representing efforts at getting the plaintiff to be specific and detailed about the discussions he supposedly had with his dad and, more importantly, what he claims were the precise terms of the oral agreement he is claiming to have reached with his father that serves as the basis of this lawsuit. *See e.g., R. Drew Thomas depo, pp. 35-42.* The following exchange is aptly illustrative of this, and of the substance of the plaintiff's testimony in this regard:

> Q. Now, you have filed a lawsuit here against your mom and dad alleging, in essence, that he had made a promise to you to give you the dealership, right?
> A. He had made a promise to me that upon his retirement, that the dealership would be mine.
> Q. And are those kind of the words that you remember him saying?
> A. Amongst others.
> Q. Well, let's review them all then. Because what I'm hearing you say - -
> A. I'll do my best.
> Q. Thank you. What I'm hearing you say is your dad, you can specifically recall words to the effect of, 'Drew, if you come over, when I retire, the business will be yours,' right?
> A. The dealership will be yours.
> Q. The dealership will be yours. Is that pretty close to at least paraphrasing the words he used?
> A. That would be fairly accurate.
> Q. Okay. Try to be as precise as you can.

A. With - - tied to I'm not going to do this if you're not coming over. I'm not going to buy it if you don't come over.

Q. Okay. I'm going to try to elicit from you all this - - anything you can recall in the way of specific words used by your dad that relate to this alleged agreement at issue in this case. Do you see where I'm going with that?

A. I'm trying.

Q. Okay. You're claiming here that your dad made an agreement with you before you joined Thomas Motors that the dealership would be yours on his retirement, right?

A. Correct.

Q. That's the substance of your allegation in this case; is that fair to say?

A. That's fair.

* * *

Q. So have you, then, told me essentially all you can remember in the way of specific words used by your dad that amounted to this agreement that's at issue in this lawsuit?

A. I'd have to say yes.

R. Drew Thomas depo. p. 40, ll. 24-25; p. 41, ll. 1-25; p. 42, ll. 1-12; p. 43, ll. 1-5.

The bottom line is based upon the plaintiff's testimony in this case, the terms of the alleged oral agreement the plaintiff is claiming he reached with his dad in 1997 was quite vague in nature and boils down to the dad purportedly saying nothing more than "the dealership will be yours" in about 8 years if the plaintiff went to work for him. The plaintiff himself acknowledged this in efforts to get him to restate or summarize the terms of the alleged deal or agreement he claims he had reached with his father:

Q. Okay. And, of course, you remember I got into this before too, trying to get the specifics of the words used that you can recall that constituted the deal. And I think we've already covered that, right?

A. As good as I believe we can, I suppose.

Q. Okay. And as I understand the substance of what you said, you understood <u>essentially the terms of the deal were that your dad said, 'If you come to join Thomas Motors as the general manager, the dealership will be yours when I retire at or about 63 years old'; is that a fair statement?</u>

A. <u>I'd say that's fair</u>.

R. Drew Thomas depo, p. 63, ll. 17-25, p. 64, ll. 1-3 (emphasis added). Thus, the so-called "oral agreement" that serves as the primary basis of the plaintiff's claims in this lawsuit is anything but specific. On the contrary, it was at best extremely vague in nature without any alleged commitment by either party on a number of essential terms that would obviously be materially important to any such agreement.

For example, the plaintiff repeatedly testified that at no point did his father ever express any kind of intention in any of their prior discussions that he would literally give the business to the plaintiff for free. In the words of the plaintiff himself:

> Now, you've got to remember, too, I never thought that I was going to get this place for free. That never crossed by mind that I'd ever get it for free.

R. Drew Thomas depo, p. 86, ll. 15-17. Elsewhere in the plaintiff's deposition he succinctly testified: "I never thought I would get it for free. I knew I would have to pay something for it." *R. Drew Thomas depo, p. 102, ll. 5-7 (emphasis added).*

Thus, according to the plaintiff, when his father allegedly told him that if he came to work for him in the summer of 1997 that at his retirement some 8 years later "the dealership would be yours", the plaintiff understood at all times from the discussions with his father that he was going to have to pay for it. They did not, however, discuss or reach agreement on what the price would be, the payment terms, etc. The plaintiff himself point blank acknowledged this in his testimony:

> Q. You at least understood that you wouldn't be getting the business for nothing, but there was no specific discussion about what you would have to pay?
> A. Correct.

R. Drew Thomas depo, p. 104, l. 104 (emphasis added).

6. The Written Agreements. Approximately 3 years after the plaintiff began working for his dad's new car dealership in the summer of 1997, it is undisputed that written agreements for the purpose of the plaintiff buying the business then known as Thomas Motors were prepared by an attorney, and signed by the plaintiff. The attorney was hired and paid by the defendants to prepare these written agreements. *See Affidavit of Ron Thomas, ¶ 6 at p. 3.* Copies of these three written agreements, containing the signatures of all pertinent parties, are being provided to the Court with this Motion. *See Affidavit of Ron Thomas, Exhibits "A", "B" and "C".* Here again, there are a number of factual disputes that relate to these written agreements, but none that matter to the present Motion before the Court. It is entirely undisputed these Agreements were prepared by an attorney (Mr. Carl Harder who is since deceased) who met with the plaintiff several times to review drafts and proposed changes. *See R. Drew Thomas depo, p. 67, ll. 17-25; p. 68, ll. 7-25; p. 69, ll. 1-22.* It is also undisputed that the plaintiff signed these agreements, willingly and voluntarily. *See R. Drew Thomas depo, p. 97, ll. 19-25; p. 98, ll. 1-5.* In particular, the plaintiff acknowledges that he signed the agreement to purchase the assets of Thomas Motors, as well as the Commercial Lease Agreement, on September 19, 2000. *See R. Drew Thomas depo, p. 71, ll. 1-10.*

The plaintiff concedes that the written agreements he signed on September 19, 2000, were quite different than the alleged oral agreement he had previously believed and/or now claims he had with his father dating back to July of 1997. *R. Drew Thomas depo, p. 105, ll. 13-17.* In fact, it is more than obvious the written agreements for the plaintiff to purchase the Thomas Motors business in September of 2000, were different in several material respects from the oral agreement he alleges he previously had with his father. Some of the differences include the following:

A. The written agreement to purchase the assets of Thomas Motors now had a

set price amount, specifically $850,000. (*See Affidavit of Ron Thomas, Exhibit "A" at p. 4, Section 14.1.* This is of course in stark contrast to the oral agreement the plaintiff claims he had with his dad up until this time, which had no set price for the purchase of the dealership business, but was instead left open to future negotiation, as the plaintiff himself acknowledges. *See R. Drew Thomas depo, p. 184, ll. 21-25; p. 185, ll. 1-2.*

B. The plaintiff also acknowledges these agreements reflected the plaintiff was no longer going to buy the business when the dad retired at or about 63 years old (in 2005), but would instead take over the business just one year later, specifically September 1, 2001. *See R. Drew Thomas depo, p. 101, ll. 17-23; see also, Affidavit of Ron Thomas, Exhibit "A".*

C. Part of the written agreements also encompass the plaintiff purchasing land upon which the new car dealership known as Thomas Motors was located, and it too had a very specific purchase price. *See Affidavit of Ron Thomas, Exhibit "B" at p. 24.* That is, the dealership business would pay rent for a number of years on a monthly basis, and the plaintiff would then have an obligation to pay a fixed amount for the land of $900,000. *See Affidavit of Ron Thomas, Exhibit "B" at p. 2, Sections 2.1 and 3.2; p. 19, Section 22.1 at p. 24.*

In short, these written agreements that were signed by the plaintiff in September of 2000 represented a very different agreement in several material respects from that which the plaintiff is claiming he had in the way of a prior oral agreement with his father dating back to the summer of

1997, as the plaintiff himself acknowledges. *R. Drew Thomas depo, p. 105, ll. 13-17.*

The specificity of all the terms of the written agreements also illustrate and/or place appropriate emphasis upon the very non-specific and vague nature of the alleged oral agreement the plaintiff claims to have had with his father. As addressed earlier, the alleged oral agreement boiled down to nothing more than the defendant Ron Thomas purportedly assuring his son in 1997 the "business would be yours" some 8 years later. The written agreements signed by the plaintiff 3 years later among other things demonstrate how many material and essential terms were missing from the alleged oral agreement, including: (1) the price; (2) the payment schedule for the price; (3) the specific date upon which the agreement went into actual effect; (4) the fact that the agreement may include some of the land owned by the defendants, and the specific lease, sale and financial terms associated with that; and (5) the conditions the plaintiff would have to satisfy before the agreement could possibly have any effect (e.g. successfully apply to become an approved franchisee from Dodge/Chrysler, which is an extremely involved process that had absolutely no guarantees of success).

7. Following the plaintiff signing the written agreements in September of 2000, the plaintiff claims that his mother and father never actually signed these agreements, but instead indicated they were not going to hold him to these written agreements. *See, R. Drew Thomas depo, at p. 118, ll. 1-24.* As such, the plaintiff claims that these written agreements that he signed are actually not of any binding effect or force upon him. *R. Drew Thomas, p. 118, l. 25; p. 119, ll. 1-5.* The plaintiff openly acknowledges he made no effort to comply with any of the requirements imposed upon him by any of these written agreements, such as making any payments towards the purchase price, making any efforts to apply to Dodge/Chrysler to become an authorized franchisee,

etc.

Q. Just answer my question. I know you want to make your pitch here, but I'm trying to get an answer from your perspective.
You made no effort to comply with any of the requirements that would otherwise have been imposed on you in Exhibits 3 and 5 after you had that conversation with your dad; is that correct?
A. That would be accurate.

R. Drew Thomas depo, p. 119, ll. 17-24 (emphasis added). See also, R. Drew Thomas depo, p. 119, l. 4 ("I didn't do anything towards them").

It should be noted here that the defendants, Ron and Elaine Thomas, strenuously dispute the factual assertions made by the plaintiff surrounding the signing of these written agreements. For example, the plaintiff is making the rather outlandish accusation that his mom and dad actually did not sign these agreements until years after the fact, notwithstanding their testimony that they both signed and dated these agreements in September of 2000, just like the plaintiff did. In any event, these factual disagreements and/or disputes are of no consequence to the issues presented by this Motion for Summary Judgment. For the present purposes, the defendants submit at least some of the important facts surrounding these written agreements in September of 2000 which are indisputably established, are:

A. The plaintiff actually signed these agreements which contain very specific terms relating to important subject matters such as the price, the payment schedule, the specific requirements imposed upon the plaintiff in order to purchase the business, etc., and that this was the first time any of these specific terms were ever discussed and/or put in writing. There were no such specific terms ever discussed, or which the plaintiff even claims to have been discussed at any point, at or before the time of the alleged oral agreement that

serves as the basis for the claims in this lawsuit; and

B. It is also of importance to note that the plaintiff openly acknowledges he made no effort to comply with literally any of the requirements imposed upon him by any of these written agreements to purchase the business assets of Thomas Motors or the land upon which it was located, such as making any of the payments required, applying to become an authorized franchisee, etc. The fact this is entirely undisputed explains, of course, why the focus of the plaintiff's claims in this lawsuit are on the oral agreement allegedly reached with his father back in the summer of 1997. He simply can not possibly prove any kind of claim arising out of these written agreements since he openly acknowledges he did not comply with literally any of the terms of these written buy/sell agreements, nor did he e ver try to do so.

8. It is also undisputed that from its inception Thomas Motors did not do well financially. For most of the years that Thomas Motors was in existence, it lost money, at an alarming rate. *(See Affidavit of Ronald Thomas, ¶ 11, at pp. 4-5, and Exhibit "D").* For his part, the plaintiff acknowledges that at the time the business was sold to third persons in early 2006, he understood the business had approximately $1,000,000 in outstanding debt. *See R. Drew Thomas depo, p. 179, ll. 1-21.* He also acknowledges his awareness that at one point the dealership was $300,000 "out of trust" with the bank that provided the loan for the line of credit for the business operation. *See R. Drew Thomas depo, p. 90, ll. 6-25; p. 91, ll. 1-21.* In fact, he attended the meeting in the Fall of 2000 with the banker and his father to discuss this very serious financial problem. *Id.* By the same token, the defendant Mr. Thomas has testified Thomas Motors "has been a loser ever since I bought

it." *Ron Thomas depo, p. 44, ll. 8-10.* He also testified that he was continually falling behind in his line of credit with the bank and he was pouring into the Thomas Motors business from other sources, and that Thomas Motors ultimately represented a huge drain on his financial resources. (*See Ronald O. Thomas depo at pp. 197-198; See also, Affidavit of Ron Thomas, ¶ 13 at p. 6.*

Towards the end of the calendar year 2005, the defendant Mr. Thomas felt like he had no choice but to sell the business, as it was turning out to be a financial disaster. *(See Ronald O. Thomas depo at p. 196, ll. 24-25; pp. 197-198; Affidavit of Ron Thomas, ¶ 13, at pp. 6-7).* The company's tax returns confirm the seriousness of this, as most of the prior years show a loss, and the loss in calendar year 2005 alone was in excess of $250,000. *(See, Affidavit of Ron Thomas, Exhibit "D".).* In fact, the financial picture relating to Thomas Motors was so bad by the end of 2005, and Mr. Thomas was unable to attract any buyers for the business, he arranged to put the business up for auction. *(See Affidavit of Ron Thomas, ¶ 13 at pp. 6-7).* If it had gone to auction, of course, that would have amounted to a fire sale of the business assets of Thomas Motors which would be expected to generate very little in return for his investment. *Id.* The business known as Thomas Motors was actually advertised for auction. *See Ronald O. Thomas depo, p. 201, ll. 8-22; Affidavit of Ron Thomas, ¶ 13 at p. 7."* However, just prior to the scheduled auction the broker retained by the defendant Mr. Thomas for the purpose of selling or auctioning off the business approached Mr. Thomas about a prospective buyer. The business was in relatively short order sold to a group of investors headed by Mr. Bill Buckner. *Ronald O. Thomas depo, p. 196, ll. 19-23; Affidavit of Ron Thomas, ¶ 13 at p. 7.* It should be noted that as part of the selling of the business to the group headed by Mr. Buckner, Mr. Thomas also agreed to sell various pieces of land he owned surrounding the land upon which Thomas Motors was located. *See Affidavit of Ron Thomas, ¶ 14 at p. 7.* In

other words, the group headed by Mr. Buckner not only bought the Thomas Motors dealership and the land upon which it was located, but also various other parcels of surrounding land that were owned by the defendant Mr. Thomas which were very valuable in and of themselves. In any event, the transaction involving the sale of these parcels of property and the Thomas Motors dealership was finalized in March of 2006. *Id.*

To put things in perspective, the business was sold to third parties a little less than a year after the plaintiff claims he expected the business to be sold to him. According to the plaintiff, the oral agreement called for his dad selling him the business when his dad turned 63 years old. The defendant Mr. Thomas turned 63 on April 12, 2005. *See Affidavit of Ron Thomas, ¶ 2 at p. 2.* It is of course entirely undisputed the plaintiff never paid his mom or dad anything towards purchasing the business (or anything else for that matter) at any point. The plaintiff also never made any application or effort to become an authorized franchisee for Dodge/Chrysler, which he would have to be to own and operate a dealership selling their new vehicles. In point of fact, it is undisputed the plaintiff did absolutely nothing towards purchasing the business from his parents at any point before April of 2005 or after April of 2005.

STANDARDS GOVERNING SUMMARY JUDGMENT

The standards governing summary judgment motions are of course well established. A motion for summary judgment "shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *I.R.C.P. 56(c); Bonz v. Sedweeks, 119 Idaho 539, 808 P.2d 876 (1991); G&M Farms v. Funk Irrigation Co., 119 Idaho 514, 808 P.2d 851 (1991); McCoy v. Lyons, 120 Idaho 765, 820 P.2d 360 (1991).* All

disputed facts are liberally construed in favor of the non-moving party. *Id.* Similarly, all reasonable inferences which can be made from the record shall be made in favor of the party resisting the motion. *Id.*

Nevertheless, when a party moves for summary judgment, the opposing party's case must not rest on mere speculation because a mere scintilla of evidence is not enough to create a genuine issue of fact. *McCoy v. Lyons, 120 Idaho 765, 769, 820 P.2d 360 (1991); G&M Farms v. Funk Irrigation Co., 119 Idaho 514, 808 P.2d 851 (1991); Petricevich v. Salmon River Canal Co., 92 Idaho 865, 452 P.2d 362 (1969).*

It is equally well-established that a party against whom a motion for summary judgment is sought may not 'merely rest on allegations contained in his pleadings, but must come forward and produce evidence by way of deposition or affidavit to contradict the assertions of the moving party and establish a genuine issue of material fact.' *McCoy v. Lyons, supra, 120 Idaho at 770; Olsen v. J.A. Freeman Co., 117 Idaho 706, 791 P.2d 1285 (1990); Clarke v. Prenger, 114 Idaho 766, 760 P.2d 1182 (1988); Doe v. Durtschi, 110 Idaho 466, 716 P.2d 1238 (1986).* This requirement has in fact been made a part of the Court rules. I.R.C.P. 56(e) provides:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

I.R.C.P. 56(e).

LAW AND ARGUMENT

The plaintiff's Verified Complaint in this case contains five separate counts or causes

of action, each of which are entirely devoid of legal merit. Each will be addressed separately and in turn.

A. Count One - Breach of [Oral] Contract.

1. The alleged contract is unenforceable because the essential terms are not sufficiently definite. This appears to be the primary cause of action made against the defendants in this action, which centers on the alleged oral agreement that the defendant Ron Thomas purportedly made with his son in the summer of 1997. As reflected above, the plaintiff claims that when his father was intending to purchase the new car dealership, then known as Johannsen Motors, he made an oral agreement with his son that if he came to work for the new dealership upon his retirement at 63 years old, the business "would be yours." The "agreement" being alleged by the plaintiff, to the extent it can even be called that, is no more specific in substance than that.

The plaintiff openly acknowledges in his testimony that the discussions he had with his father leading up to the supposed oral agreement and/or the agreement itself was very vague in nature, and left many of the essential terms of any purported agreement to future negotiation. One of the more notable examples of these essential terms, that serves to illustrate the point as well as anything else, is the price. That is, the plaintiff very clearly understood that his father was not agreeing to give him this new car dealership for free at any point. Instead, the plaintiff very clearly understood that he was going to have to pay some price for the dealership upon his father's retirement some 10 years later, but the actual amount he would have to pay was not discussed, and certainly never agreed upon at any point prior to the time he left his former employment, and went to work for his father.

As also addressed above, some three years after this oral agreement was allegedly

reached, the parties to this case actually did reach a written agreement regarding the purchase and sale of Thomas Motors, specifically in September of 2000. However, the plaintiff makes every effort in this case to completely distance himself from having anything to do with these written agreements. He claims that about a month after he signed these written agreements which covered all the material terms with detailed specificity such as price, payment schedule, etc., his father allegedly told him that he was in essence not going to hold him to these written agreements, thereby rendering them of no force and effect. It is, of course, more than obvious why the plaintiff wants to distance himself from having anything to do with these written agreements, since it is entirely undisputed that he made no effort whatsoever to comply with any of the terms of these written agreements.

In any event, according to the plaintiff, after the written agreements were signed and purportedly nullified by oral discussions with his father, he went back to understanding the same thing he had understood as a result of the alleged oral agreement he claims to have had with his dad back in the summer of 1997. That is, an oral agreement that upon his dad's retirement, "the business would be his," but the plaintiff's own testimony establishes he still had no agreement whatsoever regarding any of the specific terms upon which he would purchase the business at that point:

> Q. And that's my question. So at that point, this discussion following your signing of Exhibits 3 [agreement for the sale of assets of Thomas Motors] and 5 [commercial lease and sale agreement regarding the land] when he said he's going to give it to you, your understanding is that you're going to have to pay for it in some way, but you don't have an understanding of the specific terms of how much you would have to pay for it, right?
> A. Correct.
> Q. That would be worked out down the road?
> A. Correct.

R. Drew Thomas depo, p. 112, ll. 14-23 (emphasis added). Thus, any discussions or understandings the plaintiff claims to have had following the signing of the written agreements in September of

2000, have the same lack of specificity problems as the original alleged oral agreement in this case, supposedly reached in the summer of 1997. That is, any such oral agreement lacked virtually all of the material and essential terms that would have to be in place in order to have a valid agreement to purchase a car dealership business and the land upon which it is located.

It is a fundamental principle of contract law that any contractual agreement must be complete and definite in all its material terms, in order to be legally enforceable. *See, e.g., Wood v. Simonson, 108 Idaho, 699, 701, 701 P.2d 319 (Ct. App. 1985); Giacobbi Square v. PEK Corp., 105 Idaho 346, 670 P.2d 51 (1983); Spence v. Howell, 126 Idaho 763, 890 P.2d 714 (1995); Kohring v. Robertson, 137 Idaho 94, 44 P.3d 1149 (2002).* Conversely stated, if any portion of the proposed terms to an alleged agreement is unsettled, a legally enforceable contract does not exist. As succinctly stated by the Idaho Supreme Court:

> In order to constitute a contract, there must be a distinct understanding common to both parties. The minds of the parties must meet as to all of its terms, and, if any portion of the proposed terms is unsettled and unprovided for, there is no contract.

C. H. Leavell and Company v. Grafe and Associates, Inc., 90 Idaho 502, 511, 414 P.2d 873 (1966)(emphasis added); see also e.g. Matheson v. Harris, 96 Idaho 759, 536 P.2d 754 (1975)("A contract does not exist if any portion of the proposed terms is unsettled." Id. at 760).

Likewise, an "agreement to agree" or an agreement that leaves material terms for future negotiations is not a legally enforceable agreement. As again succinctly stated by the Idaho Supreme Court:

> Generally, an agreement to agree is unenforceable as it terms are so indefinite that it fails to show a mutual intent to create an enforceable obligation. No enforceable contract comes into being when parties leave a material term for future negotiations, creating a mere agreement to agree.

Maroun v. Wyreless Systems, Inc., 141 Idaho 604, 614, 114 P.3d 974 (2005); See also e.g. Dursteler v. Dursteler, 108 Idaho 230, 697 P.2d 1244 (1985)("If terms necessary to a contract are left for future negotiation, the contract cannot be enforced." Id. at 234).

All of the foregoing fundamental principles of contract law, absolutely requiring a contract to be definite in all its material terms in order to be enforceable, are of particular force and effect when talking about the most basic term of most agreements - the price. Here again, it is a axiomatic principle of contract law that a contract must provide for a definite price in order to be legally enforceable, or at least provide for a specific means of determining that price with some kind of reasonable certainty. *See, e.g. Garmo v. Clanton, 97 Idaho 696, 551 P.2d 1332 (1976) ("To be enforceable by a court, a contract must provide for a definite price or for a means of determining the price." Id. at 699).*

In this case, there is no question that even if the plaintiff's allegations are to be taken as true, the alleged oral agreement the plaintiff claims was reached with his father back in the summer of 1997, did not create any kind of legally enforceable obligation. Even by his own testimony, the plaintiff concedes the agreement was extremely vague in nature, and left out many essential terms that were to be left for future negotiation and agreement.

> Q. Well, in fact, as I'm understanding, other than the specifics that are addressed in the written contracts, Exhibits 3 [agreement for sale of assets of Thomas Motors] and 5 [commercial lease and sale agreement for land], all the terms of any agreement you had with your dad were rather vague?
>
> A. Other than everything would be taken care of, it's all going to be handled.
>
> * * *
>
> Q. And so how much - - so things like how much you would have actually had to pay for the business, what would have happened to the debt, all of that was to be worked on in some manner down the road, non specific, otherwise you didn't have a specific term of agreement:

A. Correct.

* * *

Q. But again, back to my point, as far as your understanding of what kind of agreement you had reached with your dad, the idea in terms of what you would of had to pay for and what would happen with the specific finances when you took over were left open to future discussion or negotiation?

A. That sounds accurate.

R. Drew Thomas depo, p. 182, ll. 18-23; p. 183, ll. 16-21; p. 184, ll. 21-25; p. 185, ll. 1-2 (emphasis added).

In summary, the plaintiff's own testimony firmly establishes that any alleged oral "agreements" he had with his father were really nothing more than "agreements to agree" which are not actual enforceable agreements at all. These so-called oral agreements simply did not contain most of the material and essential terms, if not all of them, according to the plaintiff's own sworn testimony. As such, firmly established Idaho law clearly dictates that there can be no legally enforceable obligation arising out of the alleged oral agreement being claimed by the plaintiff here.

2. The alleged oral agreement is barred by the Statute of Frauds.

Idaho Code § 9-505 provides that if certain agreements are not committed to a writing, the agreement is invalid. Among the "certain agreements" which must be in writing in order to be enforceable is the following:

> An agreement that by its terms is not to be performed within a year from the making thereof.

I.C. § 9-505(1).

The agreement in this case was made in 1997, but the transfer/sale of the company was not to take place until Ron Thomas turned 63, which was in 2005. *See R. Drew Thomas depo, p. 41, ll. 10-15; p. 23, ll. 16-19; p. 61, ll. 6-8; Affidavit of Ron Thomas, ¶ 2 at p. 2.* The agreement

being claimed by the plaintiff here could not possibly be performed within one year; in fact it was, according to the plaintiff, scheduled to take place 8 years after the fact. Such oral agreement is thus also barred by the Idaho Statute of Frauds.

Another subsection of Idaho Code § 9-505 applies to any "agreement for the sale of real property." *I.C. §9-505(4).* As reflected above, the plaintiff alleges that the only specific words ever used by his father that constituted the specific terms of such oral agreement were that "the business will be yours." As such, the plaintiff does not even appear to be claiming that the alleged oral agreement included any particular real property or land upon which the "business" will be located. However, to the extent the plaintiff would now make claim to any real property being part of the original oral agreement he alleges to have reached with his father, that part of such oral agreement would likewise be barred by the Idaho Statute of Frauds.

B. Count Two - Breach of Implied Covenant of Good Faith and Fair Dealing.

Count Two of the plaintiff's Verified Complaint in this action also relies entirely on the same alleged oral agreement that serves as the basis for Count One as discussed above. In fact, the plaintiff specifically alleges in Count Two that the defendants' "breach of the aforementioned agreement with Plaintiff" also amounted to a breach of the covenant of good faith and fair dealing "implied in the party's contract". *See Plaintiff's Verified Complaint at p. 6, ¶ 30. (Emphasis added).* In other words, this Count of the plaintiff's complaint relies for its existence on there being an enforceable oral agreement, as alleged in Count One of the Complaint.

In fact, Idaho law is quite clear that an implied covenant of good faith and fair dealing applies only to legally-enforceable, already existing agreements.

The Idaho Supreme Court has explained the implied covenant of good faith and fair

dealing as applying to "all contracts." *Luzar v. Western Surety Co., 107 Idaho 693, 696, 692 P.2d 337 (1984).* In other words, there has to be an enforceable existing contract in place already in order to trigger any of the obligations required by the implied covenant of good faith and fair dealing. Similarly, the Idaho Court of Appeals has explained the implied covenant of good faith and fair dealing as follows:

> The implied covenant of good faith and fair dealing applies to all contracts. It is a covenant that is implied by law, and it obligates the parties to cooperate with each other so that each may obtain the full benefit of performance. The implied covenant requires only that the parties perform in good faith the obligations imposed by their agreement.

Record Steel & Const. v. Martel Const., 129 Idaho 288, 292, 923 P.2d 995 (1996)(emphasis added).

As such, if there is no existing legally-enforceable agreement to begin with, a plaintiff cannot stake claim to a breach of the implied covenant of good faith and fair dealing either. This covenant attaches only to an existing contract that is of some legal force or effect. As addressed above, it is clear in this case that the alleged oral agreement by the plaintiff cannot possibly create a legally enforceable contract that gives rise to any cognizable cause of action under Idaho law. Accordingly, there is no possible cause of action for breach of any implied covenants to any such alleged oral agreement either.

C. Count Three - Quasi Contract.

The next count of the plaintiff's complaint is based upon a theory of "Quasi Contract" in which the plaintiff is claiming the defendants were "unjustly enriched" in some unspecified manner. This claim likewise fails as a matter of Idaho law.

The term "Quasi Contract" is used interchangeably with the term "unjust enrichment" as well as the term "contract implied in law." *See e.g. Cannon Builders, Inc. v. Rice, 126 Idaho 616,*

888 P.2d 790 (Ct. App. 1995); Matter of Estate of Keeven, 126 Idaho 290, 882 P.2d 457 (Ct. App. 1994). The "modern designations" for these terms are "unjust enrichment" and/or "restitution." *See e.g. Smith v. Smith, 95 Idaho 477, 511 P.2d 294 (1973).*

The essence of an action based upon unjust enrichment is a claim that a defendant has been enriched by a plaintiff, and that it would be inequitable for a defendant to retain that benefit without compensating plaintiff for the value of such benefit. *See e.g. Gillette v. Storm Circle Ranch, 101 Idaho 663, 619 P.2d 1116; BHA Investments Inc. v. State, 138 Idaho 348, 63 P.3d 474 (2003).* The party making the claim of unjust enrichment bears the burden of proof, and establishing facts showing each of the elements necessary to establish a claim for unjust enrichment. *See e.g., Kinzer v. Westgate, 129 Idaho 621 (Ct. App. 1997); Hausam v. Schnabl, 126 Idaho 569, 887 P.2d 1076 (Ct. App. 1994); Toews v. Funk, 129 Idaho 316, 924 P.2d 217 (Ct. App. 1994).* The Idaho Appellate Courts have listed the elements for a claimant to make out a prima facie case of unjust enrichment or quasi-contract as follows:

> The elements of unjust enrichment are: (1) a benefit is conferred upon defendant by plaintiff; (2) appreciation by the defendant of the benefit; and (3) acceptance of the benefit under circumstances that would be inequitable for the defendant to retain the benefit without payment of the value thereof.

Gibson v. Ada County, 142 Idaho 746, 759, 133 P.3d 1211 (2006); In re: Estate of Boyd, 134 Idaho 669, 8 P.3d (Ct. App. 2000). A plaintiff claiming he or she has been unjustly enriched also bears the burden of proving the damages element for supporting such cause of action. Under the theory of Quasi-Contract or unjust enrichment, the measure of damages is not the value of any money, labor or materials provided by a plaintiff to a defendant, "but the amount of benefit defendant received which would be unjust for defendant to retain." *Toews v. Funk, 129 Idaho 316, 322, 924 P.2d 217*

(Ct. App. 1994). The focus on a measure of damages in a claim for unjust enrichment, in other words, is on the value of benefit actually realized by a defendant which in good conscience it would be unfair to retain without making remuneration to the plaintiff. *Matter of Estate of Keeven, 126 Idaho 290, 882 P.2d 457 (Ct. App. 1994); Toews v. Funk, 129 Idaho 316, 322, 924 P.2d 217 (Ct. App. 1994).*

In the present case, it is unclear what "benefit" the plaintiff is claiming he bestowed upon his parents. The bottom line is he went to work at his parents' business from 1997 through early 2006, and he was paid a salary for such services. That is frankly all there is to it.

The plaintiff had an employment contract with Thomas Motors pursuant to which he agreed to work there, and the employer (Thomas Motors) agreed to pay him for such services. There is no dispute in this case that the plaintiff was in fact paid the agreed upon salary throughout the time he was employed at Thomas Motors. In fact, it is undisputed that about a year and a half into working for his father's then new business, he was given salary raises such that he was making as much or more than he had previously made at any point in his working life beforehand. *R. Drew Thomas depo, p. 49, ll. 18-25; p. 50, ll. 1-25; p. 51, ll. 1-12; depo Exhibit 1.*

This point is raised because it appears that plaintiff has claimed that when he first went to work for his father, he took the job offer at a "greatly reduced salary." Whatever the truth of that may be, it is again undisputed that less than two years into his employment with Thomas Motors he was making every bit as much as he had ever made in his entire wage earning life, and certainly commensurate with the monies he was making at his prior employer, Lanny Berg Chevrolet. *Id.*

More important for the present purpose, however, is the fact that he agreed to accept

a salary from his employer, and the employer paid him that salary pursuant to the employment agreement. Otherwise said, while the plaintiff does not specify what "benefit" was purportedly received by the defendants that it would be inequitable for them to retain, it would at least appear that the only possible benefit that the defendants received from the plaintiff while he worked at Thomas Motors, was just that - - the benefit of his employment services. But, he was paid for that on terms that he had agreed to. Idaho law is very clear in holding that a recovery for unjust enrichment cannot be had "where there is an enforceable express contract already covering the same subject matter." *Blaser v. Cameron, 121 Idaho 1012, 829 P.2d 1361 (Ct. App. 1991); Marshall v. Bear, 107 Idaho 201, 687 P.2d 591 (Ct. App. 1984); Triangle Min. Co. Inc. v. Stauffer Chemical Co., 753 F.2d 734 (Nth. Idaho 1985).* Here, there was an express contract already in place regarding the supposed "benefit" the plaintiff apparently claims to have bestowed upon the defendants, namely the employment contract pursuant to which he was paid the agreed upon salary. As such, the plaintiff is clearly barred by Idaho law from making any kind of claim for unjust enrichment arising out of his employment services with Thomas Motors.

Moreover, the plaintiff here can hardly prove he bestowed a benefit upon the defendants that would be "inequitable for the defendants to retain. He never contributed any monies to the business at any point, nor did he assume any of its financial risks. On the contrary, while the plaintiff was the general sales manager of the business, the business lost vast sums of money in 7 of its 9 years of existence, and the defendants are the ones who actually lost every cent of those monies. (*See, Affidavit of Ron Thomas, ¶ 11 at pp. 4-5).*

D. <u>Count Four - Breach of Contract (in the Alternative)</u>.

Count Four of the plaintiff's Verified Complaint attempts to state a cause of action

for a breach of the written agreements. The plaintiff makes a point in the complaint of noting this count is plead "in the alternative." *See Verified Complaint and Demand for Jury Trial at p. 7.* In fact, the plaintiff notes in a footnote that it is the plaintiff's position that no written contract was ever validly executed between the parties to this lawsuit. *Id., n.2.* Nevertheless, the plaintiff throws in a cause of action in which he is inexplicably claiming the defendant somehow breached the written agreements.

It would frankly seem more than obvious this cause of action should be dismissed as a matter of law. The plaintiff would of course bear the burden of proving each of the elements attached to this breach of contract claim. However, the plaintiff has openly testified to his belief that there was no written agreement ever validly executed between these parties. With that testimony, there is simply no way that the plaintiff could ever possibly establish the elements for this breach of contract cause of action.

In addition, as addressed earlier, the plaintiff openly acknowledges he made absolutely no effort to comply with any of the obligations imposed upon him under these written agreements. He specifically testifies he "didn't do anything" to comply with any of these requirements. *See R. Drew Thomas depo, p. 119, l. 4.* His reasoning for that, of course, is based upon the allegation that his father orally told him about a month after the plaintiff had signed these written agreements that he would not hold him to them. As such, the plaintiff claims to have operated with the understanding and belief that the written agreements were <u>not</u> in effect, and he acted accordingly. That is, he did absolutely nothing to satisfy any of the contractually imposed requirements upon him, such as making any payments due under the payment schedule for buying the business, making any payments towards the commercial lease and/or purchase of the land,

applying to become an authorized franchisee, etc.

This takes the concept of "alternative pleading" to an unreasonable and inappropriate level. It is one thing to state alternative causes of action based on the same set of facts. It is quite another to make an "in the alternative" cause of action that belies and flies squarely in the face of that party's own testimony. Literally everything the plaintiff has testified about concerning these written agreements establishes beyond any doubt whatsoever that he cannot possibly establish the defendants breached these written agreements. The plaintiff himself breached these agreements in multiple ways, and he himself acknowledges there is no doubt about this. Accordingly, this cause of action should likewise be dismissed as a matter of law.

E. Count Five - Fraud.

The last count of the plaintiff's complaint states a cause of action based upon fraud. This claim likewise fails as a matter of law. The undisputed facts of this case demonstrate beyond any question that the plaintiff cannot establish the elements of actionable fraud, and can certainly not even come close to doing so by clear and convincing evidence.

The elements for actionable fraud are very well established in Idaho. As stated repeatedly by the Idaho Appellate Courts:

> A prima facie case for fraud requires a claimant to prove nine elements: (1) a statement or a representation of facts; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity; (5) the speaker's intent that there be reliance; (6) the hearer's ignorance of the falsity of the statement; (7) reliance by the hearer; (8) justifiable reliance; and (9) resultant injury.

Carl H. Christensen Family Trust v. Christensen, 133 Idaho 866, 872, 993 P.2d 1197 (1999). *See also e.g., Maroun v. Wyreless Systems, Inc., 141 Idaho 604, 114 P.3d 974 (2005); Lettunich v. Key Bank Nat. Ass'n, 141 Idaho 362, 109 P.3d 1104 (2005).* It is equally well-established in Idaho that

the party claiming fraud bears the burden of proving each of the nine elements of fraud by "clear and convincing evidence." *See e.g., Lindberg v. Roseth, 137 Idaho 222, 46 P.3d 518 (20020; Sowards v. Rathbun, 134 Idaho 702, 8 P.3d 1245 (2000); Smith v. King, 100 Idaho 331, 597 P.2d 217 (1979).*

One of the typical problems facing a claimant attempting to prove fraud relates to the fact the claimant must not only prove that the speaker made a misrepresentation of fact at some point in time, but also that the speaker knew of the falsity of such representation at the time such promise was made. That is particularly true when the statements or promise being alleged as the basis of fraud relate to future events. In fact, the Idaho Appellate Courts have repeatedly stated that actionable fraud must involve a representation that "must concern past or existing material facts." *See, e.g., Thomas v. Medical Center Physicians, P.A., 138 Idaho 200, 61 P.3d 557 (2002); Weatherhead v. Griffin, 123 Idaho 697, 851 P.2d 993 (1992).* The Idaho Appellate Courts have also specifically held that an action for fraud will typically not exist for statements of future events:

> An action for fraud or misrepresentation will not lie for statements of future events. The law requires the plaintiff to form his or her own conclusions regarding the occurrence of future events. [The defendant] was required to prove by clear and convincing evidence that [the plaintiff] had no present intention of following through on the representations he complains of at the time the statements were made in order for the statements to be actionable. [The defendant] presented no such evidence; therefore, the district judge's dismissal of his misrepresentation claim is affirmed.

Thomas v. Medical Center Physicians, P.A., 136 Idaho 200, 207, 61 P.3d 557 (2002). In the present case, of course, the plaintiff's claim for fraud is based entirely on the alleged statements and/or promises made by the defendant Ron Thomas in the summer of 1997, that is before the plaintiff left his current employer to go work for his father. The allegations contained in Count Five of the Plaintiff's Verified Complaint make this clear. The plaintiff there alleges his father made promises

at that point that if the plaintiff would leave his employment at Lanny Berg, and go to work for his father, the dealership "would be yours" when his father turned 63 years old, which was in April of 2005, some 8 years away at that point. The plaintiff thus claims that the detrimental reliance he placed on the allegedly false statements was to leave his then current employer and go to work for his father at a "greatly reduced salary." This allegation thus relates to statements purportedly made by the defendant that related to a "future event," specifically an event that would take place 8 years in the future.

The plaintiff thus bears the burden in this case, by clear and convincing evidence, that the defendant Ron Thomas not only made such statements or promises to begin with, but also that such statements regarding his intention to sell the plaintiff the dealership business when the defendant retired some 8 years later, was actually a false statement when made. As illustrated in the *Thomas* decision quoted above, the plaintiff's inability to produce affirmative evidence establishing that particular element is fatal to the claim, and warrants the entry of summary judgment. The same result should apply here, because there is simply no way the plaintiff could produce competent evidence establishing by "clear and convincing evidence" that if Mr. Thomas made such statements assuring the plaintiff that he would sell the plaintiff the dealership business when he retired about 8 years later, that such statement was actually false at the time it was made.

In fact, the undisputed facts of this case clearly establish otherwise. Some 3 years after these statements were allegedly made by the defendant Mr. Thomas, there is no question there were written agreements prepared by an attorney hired by the defendants for the precise purpose of selling the business to the plaintiff. The plaintiff in fact signed those agreements in September of 2000. The undisputed fact that the defendant Mr. Thomas paid a lawyer hefty sums to prepare

written agreements memorializing a specific agreement to sell his son the business in September of 2000 clearly and unequivocally demonstrates that if he had made any statements years earlier suggesting an intention to sell his son the business, that such statements were true when made, not false when made. There is simply no evidence the plaintiff could offer that could in any way demonstrate that any statements made by Mr. Thomas back in the summer of 1997 about selling his son the business, were false statements when made, particularly under the "clear and convincing evidence" standard.

Another instructive decision by the Idaho Supreme Court here is that of *Magic Lantern Productions, Inc. v. Dulsot, 126 Idaho 805, 892 P.2d 480 (1995).* There, the plaintiff Magic Lantern was a movie theater operator in the Sun Valley area. The defendant was a developer who planned on developing a mini-mall that was intended to include a new movie theater. *Magic Lantern, 126 Idaho at 806.* The plaintiff Magic Lantern ultimately claimed that a deal was struck with the developer. *Id.* Less than a year later, the defendant "decided not to proceed with the project" and advertised the property for sale. A separate limited partnership purchased the property and ultimately agreed to lease space in the project to another movie theater operator (not the plaintiff). *Id.* The plaintiff thereafter sued and, among other things, alleged fraud. The fraud claim was dismissed on summary judgment, and the trial court's decision in this regard was unanimously upheld on appeal. The Idaho Supreme Court held as follows:

> The representations that CPP [the defendant] would build a cinema by November 1990 and would sell it to Magic Lantern [the plaintiff] for $400,000 to $450,000 are statements concerning future events. Generally, the representation forming the basis of a claim for fraud must concern past or existing material facts. Representations concerning future events are usually not considered actionable. A promise or statement that an act will be undertaken, however, is actionable if it is proven that the speaker made the promise without

> intending to keep it. Therefore, CPP's [the defendant's] representations as to future events would be actionable only if Magic Lantern [the plaintiff] could show that CPP made these representations without intending to honor them.
>
> CPP presented evidence that CPP had intended to do business with Magic Lantern as represented and that CPP abandoned the project only after the negotiations with Magic Lantern did not produce an agreement. Magic Lantern did not produce any evidence suggesting that at the time of the alleged representations CPP did not intend to carry out the project and to include Magic Lantern as represented. Therefore, the trial court was correct in granting summary judgment dismissing the fraud claim.

Magic Lantern, 126 Idaho at 807 (emphasis added). The same basic factual point is true here. That is, there is no question that the evidence in this case demonstrates that the defendants expressed a specific intention to sell the business to the plaintiff, in written agreements prepared at the behest of the defendants by an attorney, several years after the plaintiff alleges the defendants made promises about selling him the business back in the summer of 1997. Otherwise stated, there is simply no evidence that could possibly justify or establish that if the plaintiff could prove by clear and convincing evidence that the defendant Ron Thomas promised to sell him the business when the plaintiff left his employment in the summer of 1997, that such statements were actually false when made. While there are other points to make about this offensive fraud claim made by the plaintiff/son against his parents, this point alone is fatal to such fraud claim, and there is no genuine issue of material fact about it. Summary judgment is accordingly warranted on Count Five of the Plaintiff's Complaint as well.

CONCLUSION

Based upon the foregoing, the defendants respectfully submit there are no genuine issues of material fact regarding each of the plaintiff's causes of action being entirely devoid of legal

and factual merit. The defendants respectfully request that summary judgment be entered on all five counts of the plaintiff's complaint, and this case be dismissed with prejudice.

RESPECTFULLY SUBMITTED this 19th day of July, 2007.

HEPWORTH, LEZAMIZ & JANIS

By _____
John J. Janis
Attorneys for Defendants

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, with offices at 537 W. Bannock Street, Suite 200, P.O. Box 2582, Boise, Idaho 83701, and one of the attorneys for the Defendants in this matter, certifies that on this 19th day of July, 2007, he caused to be served a true and correct copy of the above and foregoing by the method indicated below, and addressed to the following:

William A. Morrow Dennis R. Wilkinson WHITE, PETERSON, PA 5700 E. Franklin Rd., Ste. 200 Nampa, Idaho 83687-7901	[X] U.S. Mail [ ] Hand Delivered [ ] Overnight Mail [ ] Telecopy (Fax)
H. Ronald Bjorkman Attorney at Law 109 N. Hays P.O. Box 188 Emmett, Idaho 83617-0188	[X] U.S. Mail [ ] Hand Delivered [ ] Overnight Mail [ ] Telecopy (Fax)

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John J. Janis

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Attorneys for Defendants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GEM

* * * * *

R. DREW THOMAS, Plaintiff, vs. RONALD O. THOMAS, ELAINE K. THOMAS and THOMAS MOTORS, INC., an Idaho Corporation, Defendants.	)	Case No. CV 2006-492 **AFFIDAVIT OF RONALD O. THOMAS IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

* * * * *

ORIGINAL

STATE OF IDAHO)
)ss.
County of Ada)

RONALD O. THOMAS, being first duly sworn upon oath, hereby deposes and states:

1. I am a defendant in the above-referenced matter, and make this Affidavit on the basis of my own personal knowledge and/or belief.

2. I am currently 65 years old. [redacted] I turned 63 years old on [redacted]

3. I worked as a salesman for Johannsen Motors in Emmett, Idaho, for approximately 26 years. The owner of Johannsen Motors was Earling Johannsen. In the mid-1990's, I decided to branch out on my own and purchased a bare piece of land, and turned it into a used car sales lot, which I called "Lot-of-Cars." A year or two after I left Johannsen Motors, to run Lot-of-Cars, Mr. Johannsen approached me about the prospect of buying him out of Johannsen Motors and various pieces of land he had surrounding the location at Johannsen Motors. My wife Elaine and I eventually agreed to do so. After reviewing some of the documents pertinent to that time frame, the purchase of Johannsen Motors by myself and my wife occurred in 1997.

4. My wife and I wanted to run this new business under the name "Thomas Motors." We arranged to create a corporate entity, specifically a Subchapter S Corporation, called Thomas Motors, Inc. We submitted corporate filings with the Idaho Secretary of State's office for Thomas Motors, Inc. which were formally filed on November 5, 2007. Until my application to become an authorized franchisor for the Dodge/Chrysler Corporation was approved, however, we continued to run the dealership business under the name Johannsen Motors for a short time. Once I was approved

as an authorized franchisor for Dodge/Chrysler, we ran the business under the name Thomas Motors. We continued to run the business under the name Thomas Motors until it was sold in early 2006.

5. I did hire my son Drew Thomas to work at Thomas Motors, specifically, as the general sales manager. He did in fact work as the general sales manager while the business was run under the name Thomas Motors.

6. In the summer of 2000 I made arrangements to have a lawyer prepare formal written agreements for the purpose of having my son, Drew Thomas, purchase Thomas Motors. The attorney's name was Carl Harder, who is since deceased. Mr. Harder prepared the agreements, as requested, and I arranged to have him paid for such legal services through Thomas Motors. As I recall at this time, I believe I paid him about $6,000 to prepare such agreements. Once they were finished, they were signed by my son Drew, as well as myself and my wife.

7. Attached as Exhibit "A" hereto is a true and correct copy of one of the three agreements prepared by Mr. Harder, which is an "Agreement for Purchase and Sale of Business Assets." As reflected in this Agreement, its general purpose was for my son Drew to purchase the business assets of Thomas Motors from myself and my wife, on specified terms, including price, the payment schedule, etc.

8. Attached as Exhibit "B" hereto is a true and correct copy of a second agreement prepared by Mr. Harder, which is specifically a "Commercial Lease and Purchase Agreement." As reflected in this Agreement, its purpose was for my son Drew to continue leasing some of the property that we owned, upon which Thomas Motors was located, and eventually to buy that same land upon which Thomas Motors was located.

9. Attached as Exhibit "C" hereto is the third of the agreements prepared by Mr. Harder in the summer of 2000, which is entitled a "Management Contract." As reflected in this document, its general purpose is to identify my son Drew as being employed as the general manager at a specified salary ($5,000 per month). At that point, my son Drew Thomas was already serving in the capacity as a general manager for Thomas Motors; this document generally served the purpose of formalizing his job title, as well as laid out some of the specific responsibilities associated with that job title.

10. When the above-referenced agreements were prepared and signed in September of 2000, as referenced above, it was my intention to sell the Thomas Motors business, and the parcels of land upon which Thomas Motors was located, to my son under the specific terms reflected in Exhibits "A" and "B" hereto. As reflected in those agreements, my son was required to make payments under a specified payment schedule. As time passed, it became obvious that he would not be able to make such payments, and I understood that he was simply going to be unable to follow through with these agreements. My son Drew Thomas made no payments to my wife or I for any purpose connected with these agreements, nor did he ever contribute any monies to the Thomas Motors business at any point. Had my son been able to make the payments associated with buying Thomas Motors, as referenced in Exhibits "A" and "B" hereto, I would have sold him the business as the agreements contemplated.

11. My wife and I owned the Thomas Motors business from 1997 through the end of the calendar year 2005. For most of those years, the Thomas Motors business lost money. Attached as Exhibit "D" hereto are true and correct copies of the first page of the federal tax returns

that were filed for our Thomas Motors business, which were filed with the Internal Revenue Service. This front page of said tax returns reflect the overall amount of profit or loss reported for the Thomas Motors business for each of the tax years covered. As reflected on the tax returns, Thomas Motors lost money in seven of the nine years of its existence. More specifically, the front page of the tax returns attached as Exhibit "D" reflect the following income or loss from business activities in each of the years of its existence as follows:

1997 - (-$51,613.00)

1998 - (-$34,940.00)

1999 - +95,286.00

2000 - (-$72,350.00)

2001 - +46,164.00

2002 - (-$36,824.00)

2003 - (-$11,204.00)

2004 - (-$36,043.00)

2005 - (-$260,252.00)

The tax return figures reflected above thus show total losses from 1997 through the end of the calendar year 2005 during 7 of the 9 years for a total of $503,226.00 and profit for 2 years of only $141,450.00, for net overall losses from 1997 through 2005, inclusive, being $361,776.00.

12. Initially, the line of credit I had arranged for the purpose of running Thomas Motors was with First Security Bank, which eventually became Wells Fargo Bank. In order to obtain such line of credit, I had to provide the bank with a personal guaranty for the line of credit on

Thomas Motors, Inc. As the business continued to lose money, I became what we refer to as "out of trust" with this lending institution who provided our line of credit. This generally meant we were not generating enough income from the business to keep up with the loans associated with our line of credit, and therefore falling short on our financial obligations to the bank. In the time frame between 2000 and 2001, Thomas Motors was more than $300,000 out of trust with First Security/Wells Fargo. There were meetings with the bank representatives, and the lending institution indicated an intent to call in the loan. I arranged for alternative financing with another lending institution, specifically Key Bank. At that point, Key Bank paid off the Wells Fargo loan and became the lending institution that financed our line of credit. I had to provide Key Bank with a personal guaranty as well, for the line of credit on Thomas Motors, Inc. As the business again continued to lose money, I eventually became "out of trust" with Key Bank as well. Throughout the years of owning Thomas Motors, I had to take monies from other financial sources my wife and I had, including our own personal accounts, and put it into Thomas Motors to try and keep the business afloat. In fact, over the years I had to take substantially more than a half a million dollars out of accounts my wife and I had, aside from Thomas Motors, and contributed such monies directly to Thomas Motors for the purpose of trying to keep that business afloat and not have the loans with the bank defaulted.

13. In short, Thomas Motors was a very serious drain on the financial resources my wife and I had over the years, to the point that it was a financial disaster. Towards the end of the calendar year 2005, I was approached by the representative of the lending institution which provided the line of credit for my other car business, Lot-of-Cars, who understood that I was taking monies

used from the profitable Lot-of-Cars business, and putting it into Thomas Motors, which was anything but a profitable business. He indicated to me in very strong terms a threat that his bank may very well call in the loan we had for the line of credit on Lot-of-Cars, if I did not do something about selling or getting rid of Thomas Motors. At that point, I was already agreed that I had no practical financial choice but to try and sell the business of Thomas Motors, and even if I was unable to sell it, to put it up for auction. I hired a broker for this purpose, Mr. Mark Bottles, who advertised the business for sale in various journals and publications. After initially unable to locate a buyer, Thomas Motors was put up for "auction." This auction was actually scheduled to take place in January of 2006. However, shortly before the date for the auction, Mr. Bottles approached me and asked what I would give him in the way of a commission if he could find a buyer for the business, as opposed to going through with the auction. I indicated to him that I would pay him a $100,000 commission if he could find a legitimate buyer, and thus avoid the auction. Mr. Bottles in fact eventually procured a buyer in the form of a group of investors that included Mr. Bill Buckner. My wife and I then sold the Thomas Motors business to this group of investors that included Mr. Buckner in early 2006. The formal documents were thereafter prepared, and the final agreements regarding this sale were memorialized in March of 2006.

14. The investment group that included Mr. Buckner was also interested in buying not only Thomas Motors, and the land upon which it was located, but various other parcels of land that my wife and I owned separately, that are adjacent to or in the same area as the location of Thomas Motors. My wife and I accordingly sold to Mr. Buckner's group not only the Thomas

Motors business and the land upon which it was located, but various other quite valuable parcels of land.

DATED this 19th day of July, 2007.

RONALD O. THOMAS

SUBSCRIBED AND SWORN TO before me this 19th day of July, 2007.

SHARRON D. FADNESS NOTARY PUBLIC STATE OF IDAHO

Notary Public for Idaho
Residing at: Boise
My Commission expires: 12/1/12

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, with offices at 537 W. Bannock Street, Suite 200, P.O. Box 2582, Boise, Idaho 83701, and one of the attorneys for the Defendants in this matter, certifies that on this 19th day of July, 2007, he caused to be served a true and correct copy of the above and foregoing by the method indicated below, and addressed to the following:

William A. Morrow Dennis R. Wilkinson WHITE, PETERSON, PA 5700 E. Franklin Rd., Ste. 200 Nampa, Idaho 83687-7901	[X] U.S. Mail [ ] Hand Delivered [ ] Overnight Mail [ ] Telecopy (Fax)
H. Ronald Bjorkman Attorney at Law 109 N. Hays P.O. Box 188 Emmett, Idaho 83617-0188	[X] U.S. Mail [ ] Hand Delivered [ ] Overnight Mail [ ] Telecopy (Fax)

John J. Janis

AGREEMENT FOR PURCHASE AND SALE OF BUSINESS ASSETS

THIS AGREEMENT FOR PURCHASE AND SALE OF BUSINESS ASSETS ("**Agreement**") dated this 1st day of September 2000, is entered into by and among THOMAS MOTORS, INC., an Idaho corporation ("**Seller**"), R. DREW THOMAS, a single person ("**Buyer**"), and RONALD O. THOMAS and ELAINE K. THOMAS, husband and wife ("**Shareholders**").

In consideration of and in reliance upon the mutual covenants contained in this Agreement, the parties hereby agree as follows.

Section 1. Premises. This Agreement is made and entered into by the parties in part upon the representations and warranties contained in this Section 1, which representations and warranties are not mere recitals, but fundamental premises upon which the transaction described in this Agreement is based.

1.1 Seller is an Idaho business corporation engaged in the business of selling and servicing Chrysler, Dodge, Plymouth and Jeep motor vehicles and related parts and accessories from premises located at 2121 Service Avenue, Emmett, Idaho 83617 (the "**Business Real Property**"), under franchises issued by Daimler-Chrysler Corporation.

1.2 Buyer wishes to purchase from Seller, and Seller is willing to sell to Buyer, all assets relating to Seller's Chrysler, Dodge, Plymouth and Jeep franchise for Emmett, Idaho, conditioned upon the granting to Buyer of an exclusive franchise for the sale of new Chrysler, Dodge, Plymouth and Jeep motor vehicles in the same geographical area as Seller's franchise.

1.3 Buyer (or a business entity that Buyer shall own) also wishes to lease two (2) of the three (3) parcels of the real property and improvements which constitute the Business Real Property, and wishes eventually to purchase one (1) of those parcels and another adjoining parcel of real property. Consequently, the purchase of Seller's business assets shall be conditioned upon the execution and delivery of the Commercial Lease and Purchase Agreement among the parties and Ronald O. Thomas and Elaine K. Thomas, husband and wife, dated September 1, 2000 (the "**Lease**").

Section 2. Definitions. In this Agreement, the following words shall have the indicated meanings:

2.1 "**Closing**" shall refer to the consummation of the transaction contemplated under this Agreement in accordance with the terms hereof, and "**Closing Date**" shall refer to September 1, 2001.

2.2 "**Seller's Business**" shall refer to any and all activities conducted by Seller in Emmett, Idaho, relating to the marketing and sale of new Chrysler, Dodge, Plymouth and Jeep motor vehicles and associated parts and accessories, and the repair and servicing of new or used Chrysler, Dodge, Plymouth and Jeep motor vehicles.

2.3 "**Purchased Assets**" shall refer to those assets which are identified in Section 3 as being purchased and sold by the parties under this Agreement. The Purchased Assets specifically shall not include Seller's accounts receivable and Franchisor holdbacks, which shall be retained by Seller.

2.4 **Seller's "Equipment**" shall refer to all non-inventory items of tangible personal property presently owned or used by Seller in connection with Seller's Business, including all of Seller's machinery, tools, signs, office equipment, computer equipment, computer programs, microfiches, parts lists, repair manuals, sales or service brochures, furniture and fixtures, and all of Seller's leasehold improvements to the Business Real Property. Within twenty (20) days after the Date of this Agreement, Seller shall provide to Buyer a list of the "Certain Excluded Equipment" being retained by Seller, which list shall be attached to this Agreement as Exhibit "A" and which list shall include, without limitation, a grinder and a brake lathe. The parties recognize and agree that Seller's Equipment does NOT include any assets of Thomas Auto Parts, Inc., which also operates on the Business Real Property and whose assets include its fixtures, equipment and inventory of motor vehicle parts and accessories.

2.5 **Seller's "Intangible Assets**" shall refer to Seller's telephone and fax numbers, service customer lists, sales customer lists, vehicle sales records, vehicle service records, all rights of Seller under contracts assigned to and assumed by Buyer pursuant to this Agreement, all goodwill associated with Seller's Business, and all other intangible rights and interests of any value relating to Seller's Business; provided, however, that Seller's Business name ("Thomas Motors") is included within the Intangible Assets being sold by Seller hereunder.

2.6 "**Business Real Property**" shall refer to all of Seller's rights under the Lease, including, without limitation, the rights to lease certain of the parcels described in the Lease and the rights and obligation to purchase certain of the parcels described in the Lease pursuant to the terms of Exhibit B to the Lease.

2.7 "**Franchisor**"shall refer to Daimler-Chrysler Corporation.

2.8 "**New Vehicle**" shall refer to a Chrysler, Dodge, Plymouth and Jeep motor vehicle which: (A) is unregistered and unused, (B) is from the 1999, 2000 or 2001 model year, (C) has been driven for less than two hundred (200) odometer miles, and (D) may be represented or warranted to consumers as "new" under Idaho law. "**Rollback Vehicle**" shall mean an unregistered vehicle from the 1999, 2000 or 2001 model year which has been sold to a customer by Seller but returned because of the customer's inability to obtain financing for the purchase.

"**Demonstrator Vehicle**" shall mean an unregistered vehicle from the 1999, 2000 or 2001 model year which has been used and operated by Seller on dealer plates for sales demonstration purposes. "**Used Vehicle**" shall mean any vehicle which is not a New Vehicle, a Demonstrator Vehicle or a Rollback Vehicle as defined in the three preceding sentences.

2.9 "**Date of this Agreement**" shall refer to the first date upon which this Agreement has been signed by all of the parties.

Section 3. Purchased Assets. Seller agrees to sell to Buyer, and Buyer agrees to purchase from Seller, those assets of Corporation specifically identified in Sections 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13 of this Agreement (the "**Purchased Assets**"). Corporation's accounts receivable and Franchisor holdbacks specifically are excluded from this transaction.

Section 4. Inventory of New Vehicles, Demonstrator Vehicles and Rollback Vehicles. Buyer shall purchase Seller's entire inventory of new Chrysler, Plymouth, Dodge and Jeep motor vehicles, as that inventory exists on the Closing Date. Buyer also shall purchase Seller's entire inventory of Demonstrator Vehicles and Rollback Vehicles. Immediately prior to Closing, Buyer and Seller shall jointly review Seller's outstanding purchase orders for New Vehicles ordered from Seller by customers but not delivered prior to Closing. At Closing, Seller shall assign to Buyer, and Buyer shall assume from Seller, all of Seller's rights (including customer deposits) and obligations (including sales commissions) under such purchase orders. At Closing, Seller shall reimburse Buyer for all deposits made to Seller with respect to ordered but undelivered New Vehicles.

Section 5. Inventory of Used Vehicles. Buyer shall purchase Seller's entire inventory of Used Vehicles, as that inventory exists at Closing, including Seller's parts trucks, service vehicles and courtesy vehicles. Those Used Vehicles that are not financed through Seller's flooring line of credit with First Security Bank of Idaho, N.A., however, shall not be part of the Fixed Purchase Price, but Buyer instead shall pay for those Used Vehicles pursuant to Section 14.2.

Section 6. Inventory of New Parts and Accessories. Buyer shall purchase Seller's entire inventory of vehicle parts and accessories manufactured by Franchisor and/or third party suppliers, as that inventory exists on the Closing Date. Buyer shall purchase that entire inventory "AS IS" as of the Closing Date. Prior to Closing, Seller shall maintain Seller's inventory of parts and accessories at a level consistent with good business practices and Seller's normal and regular course of business.

Section 7. Equipment. Buyer shall purchase Seller's Equipment. Buyer acknowledges that Seller is retaining, and is not selling to Buyer those excluded items of Seller's Equipment, as contemplated in Section 2.4.

Section 8. Supplies. Buyer shall purchase all of the gas, oil, nuts, bolts, and other automotive and office supplies which are held for use in Seller's Business.

Section 9. Contractual Rights and Obligations. At Closing, Buyer shall assume all rights and obligations of Seller under all equipment leases and other contracts. Seller warrants that all of Seller's obligations under those contracts are current as of the Date of this Agreement. Buyer agrees to indemnify Seller against all obligations under those contracts, whether they relate to periods before or after Closing.

Section 10. Repair Work in Progress. Buyer shall purchase all of Seller's vehicle repair work-in-progress (in-house and subcontracted).

Section 11. Intangible Assets. Buyer shall purchase all of Seller's Intangible Assets.

Section 12. Seller's Cash, Bank Accounts, and Notes Receivable. Buyer shall purchase all of Seller's cash, banking accounts and deposits, and notes receivable. Buyer shall take such actions as Buyer deems appropriate to collect those notes receivable, and Seller shall not be liable to Buyer to the extent that any of Seller's notes receivable are not collected by Buyer. Buyer shall retain for Buyer's own account any payment with respect to Seller's notes receivable arising out of the operation of Seller's Business prior to Closing.

Section 13. Franchisor Credits. Buyer shall purchase all of Seller's credits, deposits or other amounts due it by Franchisor as of the Date of this Agreement, except for Franchisor holdbacks that shall be retained by Seller .

Section 14. Purchase Price and Payment.

14.1 **Fixed Purchase Price.** Buyer shall pay Seller, as the total purchase price for the Purchased Assets (other than those Used Vehicles described in Sections 5 and 14.2) the amount of Eight Hundred Fifty Thousand and No/100 Dollars ($850,000.00), as such amount may be reduced by distributions made to Shareholders prior to the Closing Date pursuant to the terms of that certain Management Contract dated September 1, 2000 between the parties ("**Fixed Purchase Price**"). Buyer shall pay Seller the Fixed Purchase Price in monthly installments amortized over a period of twenty (20) years from and after the Closing, including interest at the prime rate of interest charged by First Security Bank of Idaho, N.A. plus two hundred (200) basis points, with the amortization to be adjusted concurrently with each adjustment of such prime rate of interest; provided, however, that the interest in no event shall be less than ten percent (10%). Notwithstanding such amortization schedule, Buyer shall pay Seller the entire unpaid balance of the Fixed Purchase Price and all accrued interest on September 1, 2008.

14.2 **Additional Purchase Price.** In addition to the Fixed Purchase Price provided in Section 14.1, Buyer shall pay Seller, as the purchase price for each Used Vehicle that is not financed through Seller's flooring line of credit with First Security Bank of Idaho, N.A.,

Seller's cost as reflected on its books and records for such Used Vehicle at the time Buyer sells each such Used Vehicle.

Section 15. Assumed Liabilities. In addition to the purchase of the Purchased Assets, Buyer also shall, in conjunction with such purchase, assume and take responsibility for any and all liabilities, debts or obligations of Seller (including Seller's trade payables, account payables, notes payable to Shareholders and obligations to employees), exclusive of any income tax liabilities of Shareholders.

Section 16. Warranties of Seller. Seller and Shareholders make the following warranties to Buyer, with the intent that Buyer rely thereon:

16.1 **Corporate Organization.** Seller is a corporation organized, validly existing, and in good standing under the laws of the State of Idaho. Seller is qualified to do business in the State of Idaho, and has full power and authority to own, use, and sell its assets.

16.2 **Corporate Authority.** Seller's Board of Directors and Shareholders have authorized the execution and delivery of this Agreement to Buyer and the carrying out of its provisions. This Agreement will not violate any judicial, governmental or administrative decree, order, writ, injunction, or judgment, and will not conflict with or constitute a default under Seller's bylaws, or any contract, agreement, or other instrument to which Seller is a party or by which it may be bound.

16.3 **Employee Issues.** No employees of Seller are members of any union. Within ten (10) days after the Date of this Agreement, Seller shall provide to Buyer the following: (A) a census of Seller's employees, (B) a written disclosure of all benefits made available to Seller's employees (including qualified and non-qualified retirement plans), and (C) access to all personnel files for Seller's employees. All employee benefit plans maintained by Seller for its employees shall be fully funded prior to Closing. Seller shall pay all wages, commissions, accrued vacation pay and other accrued compensation earned by Seller's employees prior to Closing (together with all accrued FICA and withholding taxes). Seller shall terminate the employment of all of Seller's employees effective as of the close of business on the Closing Date. At Buyer's sole discretion, Buyer may (but shall not be obligated to) hire any of Seller's employees.

16.4 **Undisclosed Liabilities and Contractual Commitments.** Except as otherwise disclosed in this Agreement, the following statements are true as of the Date of this Agreement and shall be true at Closing: (A) Seller does not have any liabilities which might have a material impact on Buyer's use of the Purchased Assets, (B) Seller is not a party to any contracts or commitments which might have a material impact on Buyer's use of the Purchased Assets, (C) no law suit or action, administrative proceeding, arbitration proceeding, governmental investigation, or other legal or equitable proceeding of any kind is pending or threatened against Seller which might adversely affect the value of the Purchased Assets, and (D)

Seller has all licenses, permits and authorizations required by any federal, state or local governmental or regulatory agency in order to operate Seller's Business, and knows of no reason why any such license or permit might be subject to revocation. If any claim is asserted against Buyer after Closing with respect to any obligation of Seller which Seller has failed to disclose to Buyer in writing, or which Seller has disclosed but failed to pay, then Buyer shall give prompt written notice of that claim to Seller. Seller shall indemnify Buyer with respect to all such obligations.

16.5 **Condition of Equipment.** Each item of Seller's Equipment shall be sold "AS IS" as of the Closing Date. Seller will continue to perform routine maintenance and repairs with respect to Seller's Equipment prior to Closing.

16.6 **Good Title.** Seller has, and shall transfer to Buyer at Closing, good and marketable title to all of the Purchased Assets, free and clear of all security interests, liens, equitable interests, leases, assessments, restrictions, reservations, or other burdens of any kind, other than those existing in favor of First Security Bank of Idaho, N.A. and assumed by Buyer. All current and accrued taxes which may become a lien against any of the Purchased Assets shall have been paid by Seller prior to Closing (including property taxes, sales taxes and excise taxes).

16.7 **Franchisor's Consent.** Seller shall take all actions which are reasonably necessary on Seller's part to obtain the consent of the Franchisor to the issuance to Buyer of an exclusive franchise for the sale of new Chrysler, Dodge, Plymouth and Jeep motor vehicles in the same geographical area as Seller's current franchise in Emmett, Idaho.

Section 17. Conduct of Business Pending Closing. Seller warrants that during the period beginning on the Date of this Agreement and ending at Closing: (A) Seller shall continue to operate Seller's Business in the usual and ordinary course, and in substantial conformity with all applicable laws, ordinances, regulations, rules or orders; (B) Seller shall not allow any liens to be placed against any of the Purchased Assets unless those liens are discharged prior to Closing; (C) Seller shall not take any action which may cause a material adverse change in the operations of Seller's Business; (D) Seller shall not conduct any sale which shall use the words or phrases "Going Out of Business Sale" or other words or phrases having similar meanings; and (E) Seller shall use its best efforts to preserve the value of the Chrysler, Dodge, Plymouth and Jeep franchise in Emmett, Idaho. Notwithstanding the warranties made by Seller in this Section 17, Buyer acknowledges and agrees that Buyer shall be responsible for the performance of those warranties pursuant to the terms of that certain Management Contract dated September 1, 2000.

Section 18. Representations and Warranties of Buyer. Buyer hereby makes the following representations and warranties to Seller, with the intent that Seller rely thereon: This Agreement will not violate the provision of any judicial, governmental or administrative decree, order, writ, injunction, or judgment, or conflict with or constitute a default under, any contract, agreement, or other instrument to which Buyer is a party.

Section 19. Additional Conditions Precedent to Buyer's Obligations. The obligation of Buyer to close this transaction is subject to each of the following conditions (each of which is for the benefit of Buyer and may be waived by Buyer), and Buyer shall have the right to rescind this Agreement if any of the following conditions is not satisfied in accordance with its terms:

19.1 Buyer shall have obtained from Franchisor, prior to the Closing Date, an exclusive franchise to sell new Chrysler, Dodge, Plymouth and Jeep motor vehicles in the same geographical area as Seller's current franchise in Emmett, Idaho (as evidenced by the issuance to Buyer by Franchisor of an appropriate Dealership Sales and Service Agreement, and the approval of Buyer as the publicly-owned Dealer-Operator of the franchise), and Buyer agrees to use its best reasonable efforts to obtain that franchise.

19.2 Buyer shall be reasonably satisfied with any facility improvement requirements which are imposed by Franchisor.

19.3 All of Seller's agreements and warranties set forth in this Agreement shall be true, correct, complete and not misleading at Closing; provided that Buyer's decision to close this transaction shall not release Seller from liability to Buyer for any warranty which is subsequently determined to be incorrect, incomplete or misleading.

Section 20. Closing. The parties shall make all reasonable efforts to close the purchase and sale under this Agreement at or before 5:00 p.m., Mountain Daylight Time, on or before the Closing Date, at the offices of Seller, or at such other location as shall be selected by mutual agreement of the parties.

20.1 If this transaction closes as provided in this Agreement, then actual possession and all risk of loss, damage or destruction with respect to the Purchased Assets, shall be deemed to have been delivered to Buyer at 11:59 p.m., Mountain Daylight Time, on the Closing Date.

20.2 At Closing, and coincidentally with the performance of the obligations to be performed by Buyer at Closing, Seller shall deliver to Buyer the following: (A) all bills of sale, assignments and other instruments of transfer, in form and substance reasonably satisfactory to Buyer, which shall be necessary to convey the Purchased Assets to Buyer; and (B) all other documents required under this Agreement.

20.3 At Closing, and coincidentally with the performance of all obligations required of Seller at Closing, Buyer shall deliver to Seller the following: (A) payment for the Purchased Assets; and (B) all other payments and documents required under this Agreement. Buyer shall be responsible for all sales taxes payable in connection with the transaction.

20.4 If Closing does not take place on or before the Closing Date because there has been a failure of any condition precedent set forth in Section 19, then: (A) all rights and

obligations of both parties under this Agreement shall terminate, and (B) this Agreement and all predecessor agreements shall thereafter be void and of no effect.

20.5 Both parties agree to make a good faith effort to execute and deliver all documents and complete all actions necessary to consummate this transaction.

Section 21. Survival of Representations. All representations, warranties, indemnification obligations and covenants made in this Agreement shall survive the Closing, and shall remain in effect until the expiration of the latest period allowable in any applicable statute of limitations.

Section 22. Assignment by Buyer. Buyer shall have the right to assign all of its rights and obligations under this Agreement to a business entity owned exclusively by Buyer.

Section 23. Lease and/or Purchase of Business Real Property. As a condition to the Closing of the transaction contemplated under this Agreement, Seller shall assign to Buyer (or a related entity) the Lease, including, without limitation, its terms regarding the lease of Parcels 1 and 2 of the Business Real Property, the future substitution of Parcel 3 for Parcel 2 during the term of the Lease, and the purchase of Parcels 1 and 3 of the Business Real Property.

Section 24. Miscellaneous.

24.1 There are no oral agreements or representations between the parties which affect this transaction, and this Agreement supersedes all previous negotiations, warranties, representations and understandings between the parties. True copies of all documents referenced in this Agreement are attached to this Agreement. If any provision of this Agreement shall be determined to be void by any court of competent jurisdiction, then that determination shall not affect any other provision of this Agreement, and all other provisions shall remain in full force and effect. If any provision of this Agreement is capable of two (2) constructions, only one (1) of which would render the provision valid, then the provision shall have the meaning which renders it valid. The section headings in this Agreement are for convenience purposes only, and do not in any way define or construe the contents of this Agreement.

24.2 This Agreement shall be governed and performed in accordance with the laws of the State of Idaho. Each of the parties hereby irrevocably submits to the jurisdiction of the courts of Gem County, Idaho, and agrees that any legal proceedings with respect to this Agreement shall be filed and heard in the appropriate court in Gem County, Idaho.

24.3 This Agreement may be executed in multiple counterparts, each of which shall be an original, and all of which shall constitute a single instrument, when signed by both of the parties. This Agreement shall inure to the benefit of and shall be binding upon the successors and assigns of the respective parties.

24.4 Waiver by either party of strict performance of any provision of this Agreement shall not be a waiver of, and shall not prejudice the party's right to subsequently require strict performance of, the same provision or any other provision. The consent or approval of either party to any act by the other party of a nature requiring consent or approval shall not render unnecessary the consent to or approval of any subsequent similar act.

24.5 All notices provided for herein shall be in writing and shall be deemed to be duly given when mailed by United States certified mail, postage prepaid, to the last known address of the party entitled to receive the notice, or when personally delivered to that party.

24.6 Time is of the essence of this Agreement.

24.7 Should any party hereto institute any action or proceedings to enforce or interpret any provision hereof, or for damages by reason of any alleged breach of any provision of this Agreement, the prevailing party shall be entitled to recover from the losing party or parties such amount as the court may adjudge to be reasonable attorney fees for services rendered to the prevailing party in such action or proceeding. The term **"prevailing party"** as used in this section shall include, without limitation, any party who is made a defendant in litigation in which damages and/or other relief may be sought against such party and a final judgment or dismissal or decree is entered in such litigation in favor of such party defendant.

IN WITNESS WHEREOF, the parties have executed this Agreement on the dates indicated below.

SELLER:

THOMAS MOTORS, INC.

By Ronald O Thomas Dated: 9-16-00
Ronald O. Thomas, President

BUYER:

R. Drew Thomas Dated: 09/19/00
R. Drew Thomas

SHAREHOLDERS:

Ronald O. Thomas Dated: 9-16-00

RONALD O. THOMAS

Elaine K Thomas Dated: 9-16-00

ELAINE K. THOMAS

EXHIBIT "A"

CERTAIN EXCLUDED EQUIPMENT

1. Grinder
2. Brake lathe

COMMERCIAL LEASE AND PURCHASE AGREEMENT

THIS COMMERCIAL LEASE AND PURCHASE AGREEMENT ("**Lease**"), dated this 1st day of September 2000, is entered into by and between RONALD O. THOMAS and ELAINE K. THOMAS, husband and wife, of the County of Gem, State of Idaho (collectively referred to herein as "**Landlord**"), THOMAS MOTORS, INC., an Idaho corporation ("**Tenant**"), and R. DREW THOMAS, a single person, of the County of Gem, State of Idaho ("**General Manager**").

Section 1. Real Property and Improvements.

1.1 Lease of Property. Landlord hereby leases to Tenant, and Tenant hereby leases from Landlord, those two (2) certain parcels of real property located in Gem County, Idaho, and more particularly described as Parcel 1 and Parcel 2 on Exhibit A attached to this Lease and incorporated by this reference as if set forth in full (collectively the "**Leased Property**"), Parcel 1 of which Leased Property contains an automotive sales and service facility (the "**Premises**"), and Parcel 2 of which Leased Property contains an automotive sales lot. The Leased Property and the Premises are sometimes collectively referred to as the "**Property**" in this Lease.

1.2 Substitution of Parcel 3. Parcel 3 of real property located in Gem County, Idaho and more particularly described on Exhibit A, which adjoins Parcel 1, shall be substituted for Parcel 2 under the terms of Section 1.1 at any time prior to September 1, 2005, which date of substitution shall be made by Tenant's assignee by giving Landlord at least ninety (90) days advance written notice. In the event such notice has not been given at least ninety (90) days in advance of September 1, 2003, the parties shall review the space and property utilization plans of the dealership and mutually determine exactly when the substitution shall occur. In recognition of the fact that Parcel 3 is undeveloped real property, Tenant's assignee shall have the right to begin construction of improvements to prepare Parcel 3 to be an automotive sales lot as soon as such notice has been given, subject to the provisions of Section 5. From and after the date of such notice, the Leased Property shall include all three (3) parcels until the time of the effective date of that notice, and thereafter the Leased Property shall include only Parcels 1 and 3.

1.3 Purchase of Assets. The parties acknowledge that, concurrently herewith, Tenant and General Manager are entering into that certain Management Contract (the "**Contract**"), by which the General Manager first shall operate Tenant's automotive sales and service business (the "**Business**") for a period of up to one (1) year from and after September 1, 2000. The parties further acknowledge that, concurrently herewith, the parties are entering into that certain Agreement for Purchase and Sale of Business Assets (the "**Agreement**"), by which General Manager thereafter shall acquire from Tenant all the assets used by Tenant in connection with the operation of the Business on Parcel 1 of the Leased Property and Parcel 3. All three (3)

parcels of real property are sometimes collectively referred to as the "**Real Property**") in this Lease. The full legal descriptions for all three (3) parcels of real property shall be inserted into Exhibit A within thirty (30) days after the date of this Lease, which legal descriptions shall reflect changes on the south boundary of Parcel 1 to straighten the property line thereby affecting the size of the current bull pen. The commencement of this Lease is conditioned upon the execution and delivery of the Contract and the Agreement.

Section 2. Term.

2.1 Initial Term. The initial term of this Lease (the "**Initial Term**") is seven (7) years, beginning on September 1, 2000 (the "**Commencement Date**") and terminating on August 31, 2007, unless terminated earlier pursuant to the provisions of this Lease.

2.2 Termination upon Purchase. The Initial Term shall terminate concurrently with the General Manager's purchase of Parcels 1 and 3 of the Real Property pursuant to the terms of Section 22.1 and Exhibit B of this Lease.

Section 3. Rent. Tenant shall pay to Landlord, as rent for the Property, the following amounts, determined and payable in the manner and at the times set forth below:

3.1 Security Deposit. Initially, no security deposit shall be required of Tenant. However, should Tenant commit a material default under the terms of this Lease, Landlord shall then have the right to require Tenant to pay to Landlord a security deposit equal to two (2) months' rent. If a security deposit is paid, Landlord may use all or any part of the security deposit for the payment of any loss or damage occasioned by Tenant's default. If any portion of the security deposit is so used, Tenant shall, upon receipt of notice from Landlord, deposit cash with Landlord in an amount sufficient to restore the security deposit to its original amount. No interest shall be paid on the security deposit, and Landlord shall not be required to keep it separate from Landlord's general funds. Upon full and timely performance of Tenant's obligations under this Lease, the security deposit (or remaining balance thereof) shall be returned to Tenant at the expiration of the Initial Term through the General Manager's purchase of the Business and Parcels 1 and 3 of the Real Property, or upon the termination of the Contract.

3.2 Rent. Tenant shall pay to Landlord, as annual rent, without abatement or off-set unless expressly allowed by this Lease, the monthly amount of Ten Thousand and No/100 Dollars ($10,000.00) for Parcel 1 (and Parcel 3 when it is added to the Leased Property) and the monthly amount of One Thousand Three Hundred Fifty Dollars ($1,350.00) for Parcel 2 as long as it is a part of the Leased Property ("**Base Rent**"), payable in advance on the first (1st) day of each calendar month beginning on the Commencement Date. All rent shall be in lawful money of the United States of America. Each monthly payment of Base Rent is due on the first (1st) calendar day of each month during the Lease term without the requirement of any notice or other reminder from Landlord to Tenant. The Base Rent shall be the same regardless of whether and when Parcel 3 is substituted for Parcel 1.

3.3 Additional Rent. All amounts in addition to Base Rent which, pursuant to this Lease are to be paid by Tenant to or on behalf of Landlord, shall be considered "**additional rent**" for all purposes under this Lease.

3.4 Late Fee. If a monthly Base Rent payment is not received by Landlord by the tenth (10th) calendar day of the month, Tenant shall be charged a late fee of One Hundred and No/100 Dollars ($100.00) per day (but not to exceed One Thousand and No/100 Dollars [$1,000.00] per monthly payment) retroactive to the first (1st) day of the month for each separate monthly Base Rent payment that is late. Late fees shall be additional rent due with the monthly Base Rent payment. Tenant agrees that the late fee: (a) is a reasonable estimate of the costs that Landlord would incur by reason of a late payment, and (b) is in addition to all other rights of Landlord and shall not prevent Landlord from exercising any other right or remedy available to Landlord by reason of Tenant's failure to pay rent when due.

3.5 Application of Payments. Payments made by Tenant to Landlord shall first be applied to late fees, if any, then to additional rent, if any, then to any other amounts due from Tenant to Landlord, if any, and last to Base Rent, as adjusted.

3.6 Net Lease. The parties intend that this shall be a net lease and that all rent payable by Tenant to Landlord hereunder shall be net of all costs and expenses relating to the Property, and that all such costs and expenses paid or incurred during the term of this Lease, including, but not limited to taxes, insurance, utilities, repairs and maintenance, shall be paid by Tenant, unless otherwise expressly provided in this Lease.

Section 4. Use of the Property.

4.1 Permitted Use. Initially, the sole permitted use of the Property under this Lease shall be the operation of an automotive sales and service business (the "**Permitted Use**"). Any different use of the Property by Tenant shall require the prior written consent of Landlord, which consent shall not be unreasonably withheld, conditioned or delayed.

4.2 Limitations on Use. Except with the prior written consent of Landlord (which consent shall not be unreasonably withheld, conditioned or delayed), no industrial, manufacturing or processing activity (except as is usual and incidental to the Permitted Use) shall be conducted on the Premises. Tenant shall not: (a) use the Property in any manner that would constitute waste nor shall Tenant allow the same to be committed thereon; (b) abuse walls, ceilings, partitions, floors, wood, stone, iron work, landscaping or other parts of the Property; (c) use plumbing, fire control, fire sprinkler, electrical, security, telecommunications, heating, cooling, ventilation, elevator or other Property services, systems or facilities for any purpose other than that for which it was constructed; (d) make or permit any noise or odor objectionable to the public to emit from the Property; (e) create, maintain or permit a nuisance in or about the Property; (f) permit or do anything that is contrary to any statutes, ordinances, rules, regulations and laws of any federal, state, or local governmental body or agency; (g) permit or do anything

that is contrary to any applicable rules and regulations of the National Fire Protection Association, the applicable Fire Rating Bureau and any similar bodies; or (h) permit or do anything that is contrary to any covenant, condition or restriction contained in this Lease.

4.3 Hazardous Material Use. Tenant shall not cause or permit any Hazardous Material to be brought upon, kept, or used in or about the Premises or Real Property by Tenant, its agents, employees, contractors, customers, clients, guests or invitees, except as incidental to Tenant's Permitted Use of the Property. Tenant shall comply with all applicable laws and regulations regulating the use, reporting, storage, and disposal of Hazardous Material.

4.4 Hazardous Material Definition. As used in this Lease, the term "**Hazardous Material**" means any hazardous or toxic substance, material or waste which is or becomes regulated by any federal, state or local governmental authority or political subdivision. The term "Hazardous Material" includes, without limitation, any material or substance that is (a) defined as a "hazardous substance" under applicable federal, state or local law, (b) petroleum, (c) asbestos, (d) polychlorinated biphenyl ("PCB"), (e) designated as a "hazardous substance" pursuant to Section 311 of the Federal Water Pollution Control Act (33 U.S.C. §1321), (f) defined as a "hazardous waste" pursuant to Section 1004 of the Solid Waste Disposal Act (42 U.S.C. §6903), (g) defined as a "hazardous substance" pursuant to Section 101 of the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. §9601), (h) defined as a "regulated substance" pursuant to Section 9001 of the Solid Waste Disposal Act (Regulation of Underground Storage Tanks), 42 U.S.C. §6991, (i) considered a "hazardous chemical substance and mixture" pursuant to Section 6 of the Toxic Substance Control Act (15 U.S.C. § 2605), or (j) defined as a "pesticide" pursuant to Section 2 of the Federal Insecticide, Fungicide and Rodenticide Act (7 U.S.C. § 136).

4.5 Disposal of Refuse. Tenant shall store all trash and garbage within the Leased Property or in an area designed as appropriate therefor by Landlord. Tenant shall arrange for and bear the expense of prompt and regular removal of trash and garbage from the Leased Property.

4.6 Approvals, Permits and Easements. During the term of this Lease, Tenant shall have the right to apply for and obtain any approvals, permits or licenses from any governmental entity required for the use of the Premises as contemplated herein and, in connection therewith, Landlord agrees to cooperate, provided that all costs and expenses therefor shall be the sole obligation of Tenant.

4.7 Security Services. Tenant acknowledges and agrees that Landlord has no responsibility for security at the Property, and is not responsible for providing armed or unarmed guards or watchmen, monitoring systems, security systems, fences, gates or any other security or security systems. Tenant shall provide and maintain Security Services for the Property that are appropriate for Tenant's use. The term "**Security Services**" includes, but is not limited to, any watchmen, locks, fences, alarms, doors, or other services, devices, procedures, barriers or other

measures for the purpose of protecting, safeguarding, defending, or policing persons or property from any theft, vandalism or other loss or damage. Tenant may use or install fences, locks, alarms, doors or other devices to provide Security Services, and the installation of any Security Services shall be (a) consistent with the overall design and use of the Premises and Real Property, and (b) subject to the terms of this Lease regarding "alterations, improvements and additions" in Section 5 below.

Section 5. Improvements by Tenant. Tenant shall not make any alteration, improvement or addition to the Property without the prior written consent of Landlord, which consent may not be unreasonably withheld, conditioned or delayed. All alterations, improvements, and additions: (a) shall be performed at the sole cost and expense of Tenant in compliance with all laws and regulations of any federal, state, or local governmental body, and (b) shall become and remain the property of Landlord. In contracting for any alterations, improvements or additions, Tenant shall not act as the agent of Landlord.

Section 6. Quiet Enjoyment. Landlord agrees that Tenant, upon paying the rent and performing the terms of this Lease, may quietly have, hold and enjoy the Property during the term hereof.

Section 7. Taxes and Assessments.

7.1 Payment of Taxes and Assessments. During the term of this Lease, Tenant shall pay when due and before delinquency all ad valorem real property taxes levied and assessed against the value of the Real Property and improvements thereon, and all personal property taxes levied and assessed against Tenant's trade fixtures and equipment and other personal property placed upon, or owned by Tenant in, on or about the Premises or the Real Property.

7.2 Right to Contest. Tenant, at Tenant's expense, shall have the right to contest the amount or validity of all or any part of the ad valorem real property taxes and assessments required to be paid by Tenant hereunder; provided, however, that Tenant shall indemnify Landlord against any loss or liability by reason of such contest. Notwithstanding such a contest, all taxes otherwise due and payable to Landlord by Tenant shall be paid upon demand, but any refund thereof by any taxing authority shall be the property of Tenant.

7.3 New Taxes. Tenant shall reimburse to Landlord promptly upon demand any and all taxes and other charges payable by Landlord to any governmental entity (other than net income, estate and inheritance taxes) whether or not now customarily paid or within the contemplation of the parties, by reason of or measured by the rent payable under this Lease, or allocable to or measured by the area or value of the Premises and/or Real Property, or upon the use and occupancy by Tenant of the Premises and/or Real Property, or levied for services rendered by or on behalf of any public, quasi-public or governmental entity.

Section 8. Maintenance of Property; Utilities.

8.1 Routine Maintenance and Repair. Tenant shall, at its sole cost and expense, at all times be responsible for routine repairs and maintenance of the Property as shall be necessary to maintain the Property in the condition not less than the condition of the Property existing as of the commencement of this Lease, normal wear and tear excepted.

8.2 Structural and Systems Maintenance. In addition to routine repairs and maintenance as provided in Section 8.1 above, Tenant shall be responsible for paying for the structural and systems maintenance of the Property and, in connection therewith, shall (a) make the repairs and replacements necessary to maintain the structural integrity of the Premises, including repairs and maintenance of the foundations and load-bearing walls, (b) repair and maintain in good working order the roof, paved parking areas, and the heating, ventilating, air conditioning, plumbing, and electrical systems, and (c) maintain the light ballasts.

8.3 Tenant's Liability for Repairs and Maintenance. Notwithstanding any other provision of this Lease, Tenant shall be liable for and shall promptly repair all damage to the Premises or Real Property caused by Tenant or Tenant's partners, officers, directors, employees, invitees, guests, customers, clients or licensees, regardless whether the damage is caused by the negligence of Tenant or such other persons. All repairs made by Tenant shall be at least equal to the original work in class and quality. If Tenant fails to so maintain or repair, (a) Landlord (or its agents) may, but is not required to, enter the Premises at any reasonable time to perform maintenance or make repairs, and (b) Tenant shall pay to Landlord the cost of the maintenance or repairs performed by Landlord as additional rent due with the next monthly Base Rent payment.

8.4 Utilities. Tenant shall pay for all heat, air conditioning, water, light, power and/or other utility service, including garbage and trash removal and sewage disposal, including all hookup fees or charges in connection therewith, used by Tenant in or about the Premises and Real Property during the term of this Lease. Tenant shall not be liable for any interruption or failure in the supply of any utility or service to the Property.

Section 9. Insurance.

9.1 Tenant's Obligations. Tenant shall purchase and keep in force the following types of insurance in the amounts specified and in the form hereafter provided:

(a) **Fire and Extended Coverage.** A policy or policies of fire and extended coverage insurance covering the Real Property and the Premises, in an amount not less than ninety percent (90%) of the full replacement cost (exclusive of the cost of excavations, foundations and roofing), against any peril within the classification "fire and extended coverage" or, at Landlord's election, "all-risk coverage." In addition, Tenant shall purchase and keep in force rent insurance insuring Landlord against loss of rent during the period of repair or

replacement of all or any portion of the Premises in the event of loss or damage. The insurance provided for in this Section 9.1(a) may be brought within the coverage of a blanket policy or policies of insurance carried and maintained by Tenant.

(b) **Public Liability and Property Damage.** A policy or policies of comprehensive general liability insurance with broad form general liability endorsement, or equivalent, with limits of not less than One Million Dollars ($1,000,000) per person and One Million Dollars ($1,000,000) per occurrence of bodily injury and property damage combined. The policy or policies shall also insure against liability arising out of the use, occupancy or maintenance of the Premises and the Real Property. Said policy or policies shall designate Landlord as an additional insured and shall specifically insure the performance by Tenant of the indemnity agreement(s) contained in Section 16.5 of this Lease.

(c) **Tenant's Leasehold Improvements and Personal Property.** Insurance covering all of the items comprising Tenant's leasehold improvements, trade fixtures, equipment and personal property from time to time, in, on or upon the Real Property and the Premises in an amount not less than ninety percent (90%) of their full replacement cost from time to time, providing protection against any peril included within the classification "fire and extended coverage," together with insurance against sprinkler damage, vandalism and malicious mischief and earthquakes. Any policy proceeds shall be used for the repair or replacement of the property damaged or destroyed. Landlord shall have no obligation to provide any insurance with respect to the Real Property or the Premises. Except as provided herein, each of Landlord and Tenant (a) is not obligated to obtain, (b) is not obligated to be named in, (c) shall have no right to any proceeds of, and (d) waives all claims on, insurance purchased by or for the benefit of the other party.

9.2 Policy Form. All policies required to be provided by Tenant shall be issued in the names of Landlord and Tenant and evidence thereof shall be delivered to Landlord within ten (10) days after the date of this Lease and thereafter within thirty (30) days prior to the expiration of the term of each policy. All policies shall be with an insurer with a Best's rating of B+ or higher, and shall contain a provision that the insurer shall give Landlord twenty (20) days notice in writing in advance of any cancellation or lapse or the effective date of any reduction in the amounts of the insurance. All public liability, property damage and other casualty policies required to be provided by Tenant shall be written as primary policies, not contributing with and not in excess of coverage which Landlord may carry.

9.3 Adjustment of Coverage. Not more frequently than every five (5) years during the term of this Lease if, in the opinion of Landlord based on industry and local standards and Tenant's use of the Premises, the amount of public liability and property damage insurance required to be provided by Tenant is at that time not adequate, Tenant shall increase the insurance coverage as reasonably determined by Landlord to be adequate.

9.4 Waiver of Subrogation. To the extent permitted by their respective insurers, Landlord and Tenant (and each person claiming an interest in the Property through Landlord or Tenant, including all subtenants of Tenant) release and waive their entire right of recovery against the other for direct, incidental or consequential or other loss or damage arising out of, or incident to, the perils covered by insurance carried by each party, whether due to the negligence of Landlord or Tenant. If necessary, all insurance policies shall be endorsed to evidence this waiver.

9.5 Failure to Insure. If Tenant shall fail to purchase and keep in force the insurance required by this Lease, (a) Tenant shall be in default hereunder, shall be deemed to be self-insured and shall bear all risk of loss or damage, and (b) Landlord may, but shall not be required to, purchase and keep in force the required insurance, or any portion thereof, in which event Tenant shall reimburse Landlord the full amount of Landlord's cost with respect thereto within five (5) days after written demand therefor is delivered to Tenant.

Section 10. Damage or Destruction.

10.1 Termination or Repair. If all or any portion of the Premises or Real Property are damaged or destroyed by fire or other casualty, Landlord shall deliver to Tenant written notice within thirty (30) days of the damage or destruction stating whether the Premises and Real Property can be restored within one hundred and eighty (180) days of the damage or destruction. Landlord shall have no obligation to expend more in repairing, restoring or rebuilding than the proceeds of insurance available for such purposes. If, in Landlord's reasonable judgment, the insurance settlement, permit and construction work for repairing and rebuilding the damaged or destroyed portion of the Premises or Real Property can be completed within the 180-day period with the available insurance proceeds, Landlord shall promptly proceed to repair or rebuild the damaged or destroyed portion of the Premises or Real Property. If, in Landlord's reasonable judgment, the insurance settlement, permit and construction work for repairing and rebuilding the damaged or destroyed portion of the Premises or Real Property cannot be completed within the 180-day period with the available insurance proceeds, either Landlord or Tenant may terminate this Lease upon thirty (30) days' written notice to the other party.

10.2 Abatement or Apportionment of Rent. If the Lease is not terminated, and if the damage or destruction to the Premises or Real Property is not caused by the act or failure to act of Tenant, its partners, officers, employees, agents, guests, customers, clients or invitees, then a just portion of the rent shall abate as of the date of the damage or destruction until the Premises and Real Property are repaired or rebuilt. If the Lease is terminated, the rent shall be apportioned as of the date of the damage or destruction.

10.3 Alterations, Improvements and Additions. With respect to any damage or destruction of Tenant's alterations, improvements or additions made to the Premises, (a) this